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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 72

THE INTERSTATE COMMERCE COMMISSION, APPELLANT

vs.

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, WAR FOOD ADMINISTRATOR, AND THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED MARCH 27, 1946

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3 In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action—File No. 45-C-865—Judge Igoe

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Complaint

Filed June 1, 1945

[File endorsement omitted.]

4 1. The plaintiff, A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, brings this complaint against the United States of America for the purpose of suspending, enjoining, setting aside, and annulling, the part hereinafter specified of a certain order issued by the Interstate Commerce Commission (hereinafter called the "Commission") on February 13, 1945, in a proceeding before the Commission known as "Investigation and Suspension Docket No. 4718, Grain Proportionals, Ex-barge to Official Territory." Said order is reproduced as Exhibit "A" hereof. On March 26,
5 1945, the Commission modified its said order, so that the same will become effective upon one day's notice on June 5, 1945.

2. The jurisdiction of the court to maintain this action under the averments herein made appears from the statutes of the United States in such case made and provided, and especially 28 U. S. C. A. 41 (28), 43, 44, 45, 45 (a), 46, 47 and 48.

3. Plaintiff is and for many years has been engaged as a common carrier in the business of water transportation, bringing grain to Chicago, Illinois, by barge, on the inland rivers and waterways, for reshipment at Chicago to interstate and foreign destinations lying east of Chicago.

4. At the same time certain common carriers by rail (hereinafter referred to as the "Western Railroads") have been and are engaged in rail transportation bringing grain to Chicago, Illinois, by rail, from most of the same origins served by the plaintiff, also for reshipment at Chicago to the same interstate and foreign destinations.

5. Also at the same times certain other common carriers by rail (hereinafter referred to as the "Eastern Railroads") have been and are engaged in the transportation of property by rail east from Chicago; and, more particularly, as to grain arriving at Chicago via rail, via barge, and via lake, from origins west, northwest and southwest of Chicago (grain so arriving being hereinafter referred to as ex-rail, ex-barge and ex-lake, respectively) and temporarily stored at Chicago before reshipment therefrom, said Eastern Railroads are, and for many years have been engaged in the transportation of such grain upon reshipment thereof from Chicago to destinations throughout the various states of the United States lying east of Chicago. At the times mentioned the Eastern Railroads so transported and still transport east from Chicago ex-barge grain brought to Chicago by plaintiff for reshipment there; plaintiff is a connecting carrier with the Eastern Railroads.

6. For many years the Eastern Railroads have maintained in tariffs, lawfully published and filed with the Commission, the same separately stated, reshipping or proportional rates from Chicago, Illinois, to destinations located in New England and in territory east of a northerly-and-southerly line drawn through Buffalo, New York, and Pittsburgh, Pennsylvania (hereinafter sometimes collectively called "eastern territory"), on ex-barge grain as on ex-lake or ex-rail grain, all of said reshipping or proportional rates to all points east of Chicago being lower than the corresponding rates published for application to local grain shipped from Chicago and Chicago rate points. By tariffs filed to become effective October 15, 1939 (Supplement No. 23 to Agent B. T. Jones' I. C. C. No. 3047, Supplement No. 67 to Agent B. T. Jones' I. C. C. No. 3055, Supplement No. 7 to Agent B. T. Jones' I. C. C. No. 3300, and Supplement No. 7 to Agent B. T. Jones' I. C. C. No. 3372), the Eastern Railroads proposed (a) to restrict the application of the said reshipping and proportional rates so as to make them not applicable to ex-barge grain when reshipped from Chicago; and (b) to subject said ex-barge grain to the higher basis of the local rates from Chicago. Representative examples of tariff rules which then and now provide for the application of the proportional or reshipping rates to ex-rail, ex-barge, and ex-lake traffic, and representative examples of the tariff rules containing the proposed restriction are contained in Appendices II and III to the report of Division 2 in Investigation and Suspension Docket No. 4718, Grain Proportionals Ex-Barge to Official Territory, reported in 246 I. C. C. 353. Certain parties (hereinafter sometimes called protestants) other than plaintiff filed with the Commission their written protest of September 1, 1939, and their supplemental written protest

of October 3, 1939, against such proposed schedules, alleging that, if made effective, the resultant increased rates provided for application to ex-barge grain would be unlawful under the Interstate Commerce Act, as that Act then read, and praying that the Commission institute an investigation and suspension proceeding under the authority conferred upon it by paragraph (7) of Section 15 of the Interstate Commerce Act (U. S. C., Title 49, Section 15 (7)).

7. Thereupon, the Commission, by order of October 14, 1939, suspended the operation of said proposed change in rates and instituted an investigation into the lawfulness thereof in Investigation & Suspension Docket No. 4718, above mentioned, and the Eastern Railroads, by appropriate supplements to their tariffs, deferred the effective date of the above described proposed change in rates on ex-barge traffic.

8. Subsequent to the entry of the said order of suspension, hearings were duly had in the proceeding instituted by that order, and on July 31, 1941, Division 2 of the Interstate Commerce Commission entered its report and order in said proceeding, said report and order being reported in 246 I. C. C. 353. In that report and order the said Division 2 found that the tariff schedules under suspension had not been shown to be unlawful. Accordingly, Division 2 vacated and set aside the suspension order and discontinued the proceeding as of August 30, 1941.

9. On August 22, 1941, the Commission modified the said order of Division 2 of July 31, 1941, so as to become effective on October 15, 1941, instead of August 30, 1941.

10. Thereafter, the said protestants, under date of August 25, 1941, filed with the Commission their petition for reconsideration and reargument, urging that under the facts and the law Division 2 should have found the proposal to be unlawful, and asking that the report and order of Division 2 be modified accordingly, and that the Commission order a permanent cancellation of the suspended tariff provisions.

11. On September 30, 1941, the Commission further modified said order of Division 2, of July 31, 1941, so as to postpone the effective date thereof until the further order of the Commission.

12. Thereafter, the Commission issued its report and order on reconsideration in said proceeding, said report and order being reported in 248 I. C. C. 307. In its said report the Commission stated that the proposed schedules had been shown to be just and reasonable and had not been shown to be otherwise unlawful and by its order the Commission vacated and set aside its order of suspension as of December 22, 1941, and discontinued the proceeding.

13. The record on the evidence upon which said orders of the Interstate Commerce Commission were entered, was closed in January, 1940, before enactment of Part III of the Interstate Commerce Act and before plaintiff was a regulated water carrier. Afterwards Congress amended the Interstate Commerce Act by enacting the Transportation Act of 1940. By said amendment, among other things, Part III was added to the Interstate Commerce Act, bringing water carriers under regulation by the Commission. After the taking effect of Part III of the Interstate Commerce Act (and after the plaintiff had been held in a collateral proceeding before the Commission as reported in 250 I. C. C. 77 to be a common carrier under Part III of that Act, which operating authority to plaintiff was later on extended by order of the Commission as reported in 250 I. C. C. 605) this plaintiff sought leave to intervene in said proceedings before the Interstate Commerce
9 Commission to assert rights claimed under the Transportation Act of 1940, and especially the National Transportation Policy and Section 3 (4) of the Interstate Commerce Act, as enacted by the Transportation Act of 1940, and, upon such intervention before the Commission, to present evidence in support of rights protected by said new enactment (unless the Commission were prepared to recognize such rights without further evidence). Plaintiff made such application for leave to intervene under special appearance, stating that this plaintiff could not and did not consent to be bound by a record on facts made at a time when plaintiff was not a party and before rights which it sought to assert existed, and before the statute creating those rights had been passed. The Commission denied plaintiff leave to intervene.

14. Thereafter protestants who had protested the said rate proposal of the Eastern Railroads filed their complaint in the United States District Court, praying that court to enjoin and set aside the operation and effect of the said order of the Commission effective December 22, 1941, and to prohibit said Eastern railroads from making effective and enforcing the change in their tariffs and schedules of rates said to have been approved as lawful by the Commission in said order; and this plaintiff joined in said proceeding before the District Court as an intervening plaintiff. Said District Court after due hearing entered a decree and permanent injunction as prayed in said complaint.

15. Appeal was then taken by the Eastern Railroads and others from said decree of said District Court to the Supreme Court of the United States. The Supreme Court held that the Commission in the last said order had not approved as lawful the said change in their tariffs and schedules proposed by the Eastern Railroads, and reversed the said decree of the District Court. The opinion

of the Supreme Court is reported at 319 U. S. 671, 87 L. ed. 1655.

10 16. This plaintiff then moved the Commission to reopen said proceeding, Investigation and Suspension Docket 4718, etc., and to permit plaintiff to offer evidence and be heard, which motion is reproduced as Exhibit "B" hereof; whereupon, on July 13, 1943, responsive to such motion, the Commission by its order reproduced as Exhibit "C" hereof reopened said proceeding and directed that the motions of this plaintiff, and similar motions of others, stand as complaints. Further evidence was introduced before the Commission.

17. On February 13, 1945, in said reopened proceeding, the Commission entered its order reproduced as Exhibit "A" hereof, of part of which plaintiff complains herein as aforesaid.

In and by said order the Commission disapproved, and ordered cancelled, the rate proposal it had refused to order cancelled at the time of the entry of the said order effective December 22, 1941, and which was the subject of the aforesaid legal proceedings, and which rate proposal never became effective; and plaintiff does not complain of that action.

But, in and by said order, and more particularly the report which is made part thereof, the Commission prescribed increased proportional rates to be charged by the Eastern Railroads for the transportation east from Chicago of ex-barge grain, which new rates, so prescribed, are higher than the established charges of the Eastern Railroads for the transportation to the same destination east of Chicago of ex-rail grain from the same origin. Said new rates so prescribed on ex-barge grain are higher than the established and unchanged charges of the Eastern Railroads made for the transportation of all ex-rail and all ex-lake grain, notwithstanding said higher rates are so prescribed

11 to be charged on ex-barge grain that comes from the same origin as does ex-rail grain that takes the lower, established, rates; and notwithstanding said higher rates are so prescribed to be charged on all ex-barge grain at the same time that the lower established rates of the Eastern Railroads continue to apply for their transportation service on all ex-rail and all ex-lake grain transited at Chicago, whatever the origin thereof may be; of which said action this plaintiff here complains.

Particularly the Commission found that reshipping or proportional rates for the transportation in carloads of ex-barge grain from Chicago, Illinois, to destinations easterly therefrom, will be lawful when set at certain differentials under the local rail rates from Chicago to those same destinations, namely the following differentials per hundred pounds:

When local rail rate on grain is (cents):

13–14.
15–22.
23–24.
25–26.
27–28.
28.5 and over.

Differential, ex-barge under local rail rate, shall be (cents):

1.
2.
3.
4.
5.
5.5.

Said differentials prescribed by the said order approve charges for rail transportation of ex-barge grain east from Chicago that are higher than the charges therefor on ex-rail grain from the same origins and higher than the charges therefor on ex-lake grain from all origins, by varying amounts, and higher by 3 cents per hundred pounds to eastern territory destinations, which are the most important grain destinations east of Chicago, whereof plaintiff complains.

12 18. The portion of the said order of February 13, 1945, herein complained of is contrary to law and the Interstate Commerce Act, as amended; it is contrary to Section 3 (4) of said Act as amended by the Transportation Act of 1940; it is in violation of the National Transportation Policy as enacted by the Transportation Act of 1940; in prescribing said ex-barge rates the Commission considered as warranting the portion of said order here complained of matters that do not warrant it, and that the Commission had no right in law to consider as warranting it, and matters which afford no rational basis for said portion of said order under the Interstate Commerce Act as amended in 1940; the Commission did not make findings supporting the said portion of said order here complained of; said portion of said order here complained of is not supported by the evidence before the Commission.

19. All grain of like grade and kind comes to a common value at Chicago, Illinois, regardless of the means of transportation by which it reached Chicago, the length of the inbound haul, or the rate paid for the inbound movement, provided it can all (as at present) be reshipped to eastern territory on the same charges and transited (as at present) in central territory for delivery in eastern territory on the basis of equal rates from Chicago to eastern territory. If the said order of the Commission shall become

effective it would cost more (and, to all eastern territory, three cents a hundred pounds more) for rail transportation east from Chicago of all ex-barge grain, than for said transportation of all ex-rail and ex-lake grain.

20. If the said order of the Commission should become effective, a large part of the traffic in grain now transported to Chicago, Illinois, by plaintiff, would be diverted to the lines of the Western Railroads that bring grain to Chicago from the same origins served by plaintiff.

13 21. Said report and order herein complained of expressly contemplates, that after said rate differential becomes effective, grain brought to Chicago, Illinois, by barge may sell at a discount, and fails to find that thereafter any grain will be brought to Chicago by barge for transportation east by rail.

22. The said order errs and is void for that, among other things herein also more generally mentioned, as to ex-barge and ex-rail grain, both coming from the same origin west of Chicago, Illinois (and as to ex-lake grain from any origin), receiving a transit stop at Chicago, said order prescribes higher charges for rail transportation east from Chicago of all such ex-barge grain than for any such ex-rail and ex-lake grain; and for that in so doing:

(a) Said order authorizes, permits, and prescribes a discrimination against the traffic of plaintiff, and in favor of ex-rail grain coming from the same origins served by plaintiff west of Chicago (and in favor of ex-lake grain from any origin) contrary to the Interstate Commerce Act, as amended, and particularly Section 3 (4) thereof;

(b) Said order prescribes said increase in established charges of the Eastern Railroads on ex-barge grain, and on ex-barge grain alone, on a finding that the higher charges so prescribed fully reflect the contribution of this barge grain to the transportation economy, which finding is without support in any evidence before the Commission, and which finding is contrary to undisputed evidence that the said increase of the established ex-barge rates out of Chicago to the east partly destroys, offsets, and nullifies, the inherent low-cost advantage of barge transportation into Chicago from the west, contrary to the Interstate Commerce Act, as amended in 1940.

(c) Said order prescribes the relation between charges of the Eastern Railroads for said transportation east from Chicago 14 of grain brought there by plaintiff on the one hand, and grain brought to the same transit point by the Western Railroads from the same origins served by plaintiff on the other hand, on the basis of certain average conditions therein stated rather than the particular circumstances and conditions actually characteristic of grain traffic through Chicago from the origins

that are served both by the Western Railroads and also by barge, in transportation of grain reshipped at Chicago;

(d) Said order predicates its conclusion in prescribing said rate differential unfavorable to ex-barge grain and favorable to ex-rail and ex-lake grain on a finding that the average length of all rail hauls of grain into Chicago, Illinois (which includes all-rail hauls from origins not competitive with or accessible to barge or other water transportation), is greater than the average length of all barge hauls of grain into Chicago, which finding has no rational bearing on the non-discriminatory relationship that should exist under the Interstate Commerce Act between the charges for rail transportation service in moving east from Chicago grain brought there by rail and barge, respectively, from the same origin, whether that origin is St. Louis, Missouri, Morris, Illinois, or any other particular port from which grain can be, at the shipper's choice, brought into Chicago for reshipment there either by the Western Railroads or by plaintiff (or some other barge carrier); and no bearing on the non-discriminatory relationship that should exist under the Interstate Commerce Act between the charges for rail transportation service in moving east from Chicago grain brought there by lake steamer and by barge, respectively, from whatever origin.

(e) Said order prescribes the relationship it specifies between the ex-barge, ex-rail and ex-lake grain rail rates of the Eastern Railroads out of Chicago on a finding that ex-barge grain, on the average receives more rail terminal and transit service than ex-rail grain, which finding is not rationally related to the conclusion that ex-rail grain which receives the full terminal
15. and transit service allowed by the rail tariffs should receive any lower basis of charge than ex-barge grain receiving only the same terminal and transit service, nor to the conclusion that ex-lake grain (all of which has a transit stop at Chicago and full transit service) should receive any lower basis of charge than ex-barge grain, nor is there either evidence or finding that the difference in cost of transit service between ex-barge grain, ex-rail grain, and ex-lake grain, is substantial, or rationally related in amount to the amount by which said order prescribes an increase in the ex-barge rates.

(f) Said order predicates said rate differential it prescribes on a finding that ex-rail grain receives, on the average, less line-haul service to southern points of central territory, but there is no finding that this is true as to ex-rail grain moving through Chicago; nor is that finding rationally related to the said increase so prescribed in ex-barge rates to New England and Eastern territory.

(g) In finding that the ex-barge traffic cannot be accorded the same out-bound proportionals as ex-rail traffic for the reason that to do so would extend to barge-rail transportation most of the advantages of all-rail transportation, the Commission predicates the rate differential above referred to on a misconstruction of the Interstate Commerce Act as amended by the Transportation Act of 1940, which, in directing the Commission to administer and enforce every section of the Interstate Commerce Act so as to preserve the inherent advantages of the modes of transportation therein referred to, meant not merely their preservation as advantages to be enjoyed by the persons operating the respective modes of transportation, but directed the administration and enforcement of the Interstate Commerce Act and each section thereof so as to preserve the advantages of the various modes of transportation in the interest of the needs of commerce and the national defense. The increase of the cost of barge-rail transportation authorized by said order, by increasing the established levels of rail charges for the out-bound transportation of
16 grain east from Chicago, Illinois, is a sacrifice of inherent low-cost advantage of water transportation to Chicago; and the diversion of grain traffic into Chicago from the low cost water line of this plaintiff to the higher cost rail lines of the Western Railroads, that would follow the said increase in the established charges for rail transportation of grain out-bound from Chicago that has come there by barge, would be to increase the cost of transportation of grain through Chicago, Illinois, thereby failing to preserve and sacrificing inherent low-cost advantage of in-bound barge transportation, all to the prejudice of the needs of commerce and the national defense, contrary to the Interstate Commerce Act as amended.

(h) The Commission was without authority, in law or in fact, to make the portion of the said order herein complained of.

Wherefore, plaintiff prays:

(a) That a preliminary injunction be entered enjoining and setting aside the operation and effect of the said order of the Commission of February 13, 1945, as to that portion thereof that authorizes the imposition of a basis of rail charges for the transportation of ex-barge grain out of Chicago that is differentially as unfavorable to ex-barge grain, and as favorable to ex-rail and ex-lake grain, as is therein authorized, and that upon final hearing a decree be entered perpetually enjoining and setting aside the said operation and effect of said order;

(b) That plaintiff have such other, further or different relief in the premises as the nature of the case shall require and to this court shall seem proper.

Lord, Bissell & Kadyk,
Edward B. Hayes,
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EDWARD B. HAYES,
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2400 Field Building, Chicago, Illinois.

17 *Exhibit A to complaint*

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 4718

GRAIN PROPORTIONALS, EX-BARGE TO OFFICIAL TERRITORY

Submitted January 5, 1945—Decided February 13, 1945

On further hearing, reasonable and otherwise lawful proportional rates prescribed for the interstate transportation of ex-barge grain, in carloads, from Chicago, Ill., to destinations in official territory. Proposed schedules ordered canceled, without prejudice to the filing of new schedules in conformity with the findings herein. Prior reports, 246 I. C. C. 353, 248 I. C. C. 307.

F. H. Cole, L. P. Day, K. A. Dobbins, and Arthur Van Meter for respondents.

H. C. Barron, Freeman Bradford, L. H. Dugan, A. B. Enoch, Henry Christianson, Lawrence Farlow, P. F. Gault, E. A. Gorges, B. L. Hamilton, J. W. Holloway, E. M. Martin, E. L. Peterson, W. R. Scott, E. A. Smith, C. L. Taylor, and M. V. Wheat for interveners supporting respondents.

J. K. Knudson and C. B. Nutting for United States Department of Agriculture and War Food Administrator.

D. F. Cavers, R. H. Field, B. M. Fitzgerald, M. D. Miller, and Warren Price, Jr., for Federal Price Administrator.

H. C. Banks, G. W. Baxter, N. D. Belnap, S. H. Benson, J. S. Brown, H. H. Dewey, E. B. Hayes, I. M. Herndon, W. E. Maloney, F. R. Markland, M. C. Pearson, D. F. Root, F. H. Sparrow, C. J. Steffen, and L. M. Walter for other protestant petitioners.

SPLAWN, Commissioner:

Exceptions were filed to the report proposed by the examiner on further hearing, and the parties were held in oral argument.

INTRODUCTION

By schedules filed to become effective October 15, 1939, respondent rail carriers in official territory proposed to restrict their reshipping or proportional rates[1] on grain and grain products, in carloads, from Chicago, Ill., to destinations in official territory so that they would not apply on ex-barge (Illinois Waterway) traffic except on grain products from Kansas City, Mo. To central territory the proportionals from Chicago on grain coming in by barge from the Illinois ports average about 3.3 cents less than the local rates and are the same as the so-called Northwest proportionals applying on grain coming in by rail or lake from the Northwest, hereinafter described, and on grain coming in by barge from Kansas City average 5.3 cents under the local rates and are the same as the so-called trans-Mississippi proportionals which apply on grain coming in by rail from origins west of the Mississippi other than the Northwest. To trunk-line and New England territories, the proportionals from Chicago on grain coming in by barge from both the Illinois ports and Kansas City are 8.5 cents under the local rates and are the same as the uniform proportional rates applying on ex-lake grain and on grain coming in by rail from origins west of the Mississippi River and the unpublished
19 outbound specifics of the through one-factor all-rail rates applying to those territories from Illinois origins. The proposed schedules deal not only with ex-barge grain from Chicago but also from Peoria, Ill., and St. Louis, Mo., all three points being hereinafter referred to as the gateways. However, ex-barge grain presently takes local rates from St. Louis, and in most instances from Peoria. The effect of the proposed schedules would be to increase the ex-barge proportionals from Chicago to the full local basis.

In the original report, 246 I. C. C. 353, division 2 found that the application of the proportional rates on the ex-barge traffic from Chicago was without tariff authority and that the proposed schedules merely clarified this situation and were not shown to be unlawful. In the report on reconsideration, 248 I. C. C. 397, we found that the proportional rates on the ex-barge traffic from Chicago were legally applicable in the past where the policing

[1] Unless otherwise indicated, rates, margins, and similar figures given herein are in cents per 100 pounds.

provisions of the governing tariffs were strictly complied with, and that the proposed schedules were shown to be just and reasonable and not shown to be otherwise unlawful. We added that in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than the local rates under section 6 (11) (b) of the act or joint barge-rail rates lower than the combination of the barge rates to the gateway plus the local rates beyond under section 15 (3) and 307 (d). An order was entered vacating the order of suspension and discontinuing the proceeding.

Ex-barge, ex-lake, and also ex-rail traffic except as hereinafter indicated, are all accorded the same outbound service, but we found, in effect, that there are circumstances and conditions affecting the outbound and through rates which are so different on the ex-barge traffic as compared with the ex-rail and ex-lake traffic that some difference in rate treatment is justified without contravening the provisions of sections 1, 2, 3 (1); 3 (4), and 15a (2) of the act, administered, as the act requires, "with a view to carrying out" the national transportation policy. Certain of the protestants sought an injunction against the enforcement of our order on the ground that such circumstances and conditions were beyond our authority to consider. The statutory court granted such injunction, but on appeal this action was reversed by the Supreme Court, which held that we had acted within the power delegated to us by law. Interstate Commerce Commission v. Inland Waterways Corporation, 319 U. S. 671. Thereafter, upon petition of certain of the protestants, we reopened the proceeding for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by rail of ex-barge grain, in carloads, from Chicago and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic, and (2) to determine what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by A. L. Mechling, doing business as A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed. Respondents have voluntarily postponed the effective date of the proposed schedules pending the outcome of the further hearing.

Petitioner-protestants appearing at the further hearing include certain grain dealers and elevator operators at Chicago and along the Waterway, the Inland Waterways Corporation, operating the Federal Barge Line, the Illinois Agricultural Association, and the United States Department of Agriculture, which appeared as

protestants at the original hearing, the Chicago Board of Trade, which supported respondents at the original hearing, and,
21 in addition, the Mechling Barge Line, certain rail and river elevator operators with headquarters at Peoria, Ill., the Corn Exchange of Buffalo, N. Y., the Montana Flour Mills of Cleveland, Ohio, the American Farm Bureau Federation, the War Food Administrator, and the Federal Price Administrator. Interveners supporting respondents on further hearing are the western rail carriers, the Board of Trade of Indianapolis, Ind., and associations of private and farmer cooperative grain elevator companies at numerous stations in the State of Illinois, which appeared in support of respondents at the original hearing, and, in addition, the Kansas City Board of Trade, and Kansas-Missouri River Mills. The Peoria Board of Trade and Mississippi Valley Association, which supported respondents and protestants, respectively, at the original hearing, did not appear at the further hearing.

The parties generally adhere to their original position; that is, protestant-petitioners contend that the ex-barge traffic is entitled to proportionals no higher than the ex-rail and ex-lake traffic, while interveners contend that it is entitled to nothing lower than the local rates. Protestant-petitioners contend that there is no material difference in the circumstances and conditions affecting the outbound and through rates on the barge-rail, lake-rail, and all-rail traffic, and that assuming the ability of the barge carrier to maintain inbound rates on a lower basis than the rail rates is an inherent advantage of barge transportation, within the meaning of the national transportation policy, and that the proportional rates maintained by respondents are reasonable for the service beyond the gateways, the application on the ex-barge traffic of rates higher than such proportionals pro-tanto deprives shippers and the general public of such inherent advantage and results in rates in contravention of the above provisions of the act. Respondents and interveners contend that the cir-
22 cumstances and conditions affecting the out-bound and through rates on the barge-rail traffic are substantially and materially different from those affecting the out-bound and through rates on the lake-rail and all-rail traffic. As to the latter, they contend that "to take the all-rail rates and chop them in the middle" and apply the outbound division or proportion to the ex-barge traffic is to accord the barge transportation an artificial advantage and pro-tanto to deprive those interested in rail transportation of the inherent advantages thereof, and that therefore respondents may lawfully maintain higher rates on the ex-barge traffic than on the ex-rail traffic.

The parties agree that there is no necessity for joint rates on the barge-rail traffic and that the ex-barge proportionals should be subject to the customary differentials an the products and export traffic. The result of the further hearing, in the language of the Court, has been "to develop a record upon which the Commission may prescribe rates on the ex-barge traffic (from Chicago) in view of its particular circumstances and under the provisions of the act designed with reference thereto."

In recent years, a comprehensive inland waterway system has been developed, largely at public expense, in connection with the Mississippi River and its tributaries, certain rivers in Alabama, and the intra coastal canals. The present proceeding is important not only as to the particular traffic under consideration but also insofar as it may provide administrative standards which may be used as guides in fitting barge transportation into the general rate structure, particularly on grain and grain products, under the governing statutory provisions, in fairness to all concerned, and in the public interest generally.

The facts adduced at the original hearing are correctly summarized in the original and prior reports, except as hereinafter indicated, and need not be repeated here except to complete understanding of the situation. The principal changes as developed on further hearing are the decline in the lake traffic from and to Chicago due to scarcity of boats and higher war-time rates, the shift from a buyer's to a seller's market, the fixing of ceiling prices and margins by the Federal Price Administrator, and the granting by division 4 of a certificate to operate as a common carrier of grain to the Mechling Barge Line, which now handles practically all the grain moving from the Illinois origins to Chicago. *A. L. Mechling Barge Line Common Carrier Application*, 250 I. C. C. 77, 605.

The record, as amplified on further hearing, is very comprehensive. It includes documentary evidence as to the rate and production-shipment situations, and oral testimony as to the all-rail, lake-rail, and barge-rail rate adjustments, the service and commercial situations thereunder, rate history, and the effect of the rates on the movement of the traffic.

The rate evidence is summarized in tabular form in appendix A hereto. Table I shows the average local and proportional rates to representative destinations in central and trunk-line and New England territories. To show the relative level of these rates, they are compared with the so-called western trunk-line scale, which is the present-day equivalent of the scale set forth in Grain and Grain Products, 161 I. C. C. 619, 822. Table II shows to representative destinations from Chicago the present local rates and ex-rail and ex-lake proportionals and the ex-barge

proportionals prescribed herein. In those tables, Trans-Mississippi, Northwest, and Illinois proportionals are referred to as T. M., N. W., and Ill., respectively. Under the proposed schedules, the ex-barge proportionals from Chicago would be increased from an average of (a) 16.1 cents (Northwest) and 14.1 cents (T. M.) to central territory and (b) 24 cents to trunk-line and New England territories, to the local rates averaging 19.4 and 32.5 cents, respectively. Table III shows from representative origins in 7 grain producing States west of the Mississippi River, the average rates to Chicago, and the average through all-rail rates to the respective destination territories, as compared with the through rates under the w. t. l. scale, and the balances or increments under the scale for the distances beyond Chicago. Tables IV and V show like information from the principal origins served by the Waterways, together with the inbound barge rates and the through barge-rail rates on the present basis, and those proposed by respondents and prescribed herein.

The production-shipment evidence is summarized in appendix B hereto. Table I shows the production of wheat and corn by certain States and groups of States for the year 1942. Table II shows for the same year the receipts of wheat and corn at the principal markets. Table III shows the volume of corn, wheat, oats and soybeans received at Chicago and shipped therefrom during 1940, 1941, 1942, and the first 10 months of 1943, and is a continuation of appendix I to the original report, 246 I. C. C. 353, 383–384. Table IV is an analysis of barge corn shipped to Chicago from the Illinois origins for a representative period during 1942–1943, according to distance from the Waterway, comparing the total on the barge shipments of the inbound truck cost, the barge rate, and the trimming charge with the corresponding interstate and lake local rates by rail.

Grain is a heavy-loading, fungible, bulk commodity and is peculiarly adapted to barge and carload transportation.

THE ALL-RAIL ADJUSTMENT

The rates for all-rail movement from and to the points here considered are a part of the all-rail rate structure on grain and grain products to official territory from origins west of Lake Michigan and the Illinois-Indiana line. The through rates from origins west of the Mississippi River are combinations over one or more of the gateways, or final terminal markets, composed of inbound factors prescribed by us in Grain and Grain Products, supra, and subsequent proceedings, and applying both locally and proportionally, plus the eastern factors, which are lower than the local rates beyond.

From Iowa and Missouri, the through rates are generally on a two-factor combination. From western and southwestern origins beyond the Minnesota and Missouri river primary markets the through rates are on a three-factor combination, composed of local or gathering rates to those markets, plus intermarket proportionals from those markets to the gateways and the outbound proportional beyond. With respect to the nature of this adjustment, we said in Grain and Grain Products, 215 I. C. C. 83, 95:

"St. Louis, Peoria, and Chicago are final terminal markets in the western district, situated at the eastern edge of that district. The important proportional rate adjustment in western trunk-line territory is the one to those markets (rather than between them) from the first line of markets at the Missouri River, Minneapolis, and Duluth. On shipments beyond those markets to the East the important adjustment is the equalization of the through charge, by making the outbound reshipping rates from Peoria on trans-Mississippi River traffic, and from St. Louis on all traffic, higher than from Chicago by the amount that the inbound rates to Peoria and St. Louis are lower than to Chicago."

26 To trunk-line and New England territories the proportionals from Chicago and other gateways are uniform regardless of origin. From Chicago to central territory there are three sets of outbound proportionals depending on the origin territory, namely, the Northwest proportionals applying on traffic originating in North Dakota, South Dakota, Minnesota, Wisconsin, the upper peninsula of Michigan, Montana, Wyoming, Idaho, Oregon, Washington, and certain Canadian provinces, the Trans-Mississippi proportionals applying from other origins west of the Mississippi River, and the Illinois proportionals applying on grain originating in Illinois territory. See appendix A, tables I and II. The Northwest and Trans-Mississippi proportionals are on the basis prescribed by us primarily for the purpose of equalizing the Minnesota and Missouri River markets. Southwestern Millers' League v. Atchison, T. & S. F. Ry. Co., 225 I. C. C. 195.

From Illinois, through one-factor rates apply (a) to destinations in central territory in all instances on grain products and in a few instances on grain and (b) to destinations in trunk-line and New England territories on both grain and products. Of the latter, the divisions or outbound specifics according to the lines east of Chicago and Illinois-Indiana junction points as far south as Vincennes, Ind., are the same as the uniform proportional rates applicable from Chicago on grain from the West. The differences between such divisions or specifics and the through rates are known as inbound specifics. From northern Illinois (north of the line of the Toledo, Peoria & Western), the inbound specifics are generally the same as the inbound interstate rates. From central

and southern Illinois, the inbound specifics are generally lower than the inbound interstate rates. The primary object of the Illinois rail adjustment is to enable the north-and-south carriers to participate over their circuitous routes via Chicago in rates
27 the same as those over the direct routes of the east-and-west carriers. Due principally to the equalization of gateways and routes, the ex-rail proportionals to central territory do not bear any consistent relation to the local rates from Chicago but reflect a rapidly decreasing percentage thereof as the distance from and the circuity via Chicago increases (See appendix A, table II).

The history of the uniform ex-rail proportionals or specifics to trunk-line and New England territories, using New York, N. Y., as illustrative, is as follows: Prior to February 6, 1905, the through rates from origins west of the Mississippi River were combinations over the river crossings, the divisions to the eastern carriers beyond Chicago being prorates of the eastern factors. Prior to February 1, 1905, the through rates from the Illinois origins via Chicago were made on combinations over that gateway. On those respective dates, from origins west of the river, the prorates beyond Chicago were canceled, and a proportional rate of 17.5 cents, the same as the local rate, established in lieu thereof, and from the Illinois origins, through one-factor rates were established via Chicago made the usual group percentages and in some instances arbitraries over Chicago-New York, resulting in divisions or transit balances beyond Chicago varying with the Illinois origin. This basis for through one-factor rates and divisions from the Illinois origins was unsatisfactory to the participating carriers, as well as the trade, and on May 1, 1907, was superseded by the specific basis, with a minimum inbound specific of 4.5 cents and a uniform outbound specific of 15 cents (later increased to 15.5 cents), or a minimum through rate of 19.5 cents, which was also established as the local rate from Chicago to comply with the fourth section. The 17.5-cent proportional on grain originating west of the river continued in effect until May 1, 1908, when it was reduced to 16 cents on wheat and corn, and 17
28 cents on oats, rye, and barley. On February 1, 1910, the latter was reduced, and the eastern specific or division on Illinois traffic was increased, to 16 cents, pursuant to an agreement between respondents and the trade, resulting in reductions and increases in the through rates from the west and Illinois, respectively, of like amount, and for the first time in uniformity in the proportionals or divisions beyond Chicago irrespective of origin. To trunk-line and New England territories, the present local rates and uniform proportionals or specifics beyond Chicago, averaging 32.5 and 24 cents, respectively, represent the 19.5 and 16-cent

figures, as modified by the subsequent general rate changes and as reduced 5.5 cents on July 1, 1934.

The service under the inbound rail rates to the gateways includes switching to the train at origin, the privilege of intermediate transit stops, not exceeding three, and terminal service at the gateway. The through rates apply whether the traffic moves in continuous through transportation in which case interchange is the only service performed at the junction, or under the governing transit provisions where it is stopped at the gateway or other intermediate point for marketing or processing. In the latter event, the outbound service generally consists of concentrated movements in large lots of several cars at a time out of terminal elevators. The local rates from the country origins apply to traffic which is picked up a single car at a time. However, a concentrated movement from a large terminal does not necessarily reduce costs. This is particularly true "in an area as congested as the Chicago switching district which presents a complicated network of railway lines probably not equaled in any other section of the country." Switching Rates in Chicago District, 177 I. C. C. 669, 711.

From the gateways, grain products to trunk-line and New
29 England territories take 0.5 cent over grain, and export traffic to the north Atlantic ports takes 8.5 cents under the domestic rates. In this proceeding the rates to trunk-line and New England territories are by far the more important, as marketers and processors in central territory can and do transit under such rates. Local disposition in central territory, at least so far as Illinois origins are concerned, is largely taken care of by the joint rates above referred to.

In connection with the ex-rail proportionals, a so-called fourth-section rule applies as follows:[2]

"In no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rate from the reshipping point to be added to the reshipping rate therefrom."

To trunk-line and New England territories, the effect of this rule, insofar as the shipper is concerned, is to limit the application of the outbound proportional rate to traffic on which a minimum inbound rail rate of 8.5 cents was paid. The local and through rates under the all-rail structure thus reflect a consistent grading from east to west, the local and through rates from the intermediate points being lower than the corresponding rates from the more distant points over the direct routes in strict conformity with section 4. The only exceptions to this are certain departures

[2] In some instances this rule contains the words "via rail."

caused by the differing level of the proportional rates to central territory. As an extreme example, to Cleveland, Ohio, the through rate from Low Moor, Iowa, is 29.5 cents composed of the inbound rate of 14 cents plus the Trans-Mississippi proportional of 15.5 cents beyond, while the through rate from Clinton, Iowa, an intermediate point on the Mississippi River, is 33 cents composed of the inbound rate of 14 cents plus the Illinois
30 proportional of 19 cents beyond. In this connection, it should be noted that, on the average, the through rates from Illinois territory are on a lower level than the rates from origins west of the river as shown by appendix A, tables III and IV. Owing to their method of construction and the considerable grouping of origins and destinations, the through rates on this traffic do not conform to any particular distance scale. However, the average level of the through rates and the local rates in w. t. l. and central territories in general closely approximates the so-called w. t. l. scale. See also Tex-O-Kan Flour Mills Co. v. Abilene & S. Ry. Co., 255 I. C. C. 5, 22.

The outbound balances of one-factor rates under any scale which employs diminishing progression will, of course, become less as the inbound and through hauls increase. Thus appendix A, tables III and IV, show that to trunk-line and New England territories, the outbound balances or increments for the distances beyond Chicago under the w. t. l. scale are 30.5 cents from Morris, with the shortest inbound haul of 59 miles, 29.5 cents from Seneca, 69 miles, 28 cents from the other Illinois origins 82 to 250 miles, 26 cents from Iowa and Missouri, 337 and 382 miles, 26 cents from Kansas City, 436 miles, 25 cents from Minnesota and Nebraska, 483 and 630 miles, 24 cents from Kansas and South Dakota, 660 and 714 miles, and 23 cents from Colorado, with the longest inbound haul of 950 miles. These balances average about 28.5 cents from the Illinois origins and 25 cents from the seven western States, while the average uniform proportional or specific applied by respondents from Chicago on traffic from all of these origins is 24 cents on grain and 24.5 cents on grain products. Combined with the inbound rail rates, these result in through all-rail rates lower than the scale where the inbound distances are shortest and about on the scale where the inbound distances are
31 longest. Thus, under the all-rail adjustment, the through rates and eastern factors thereof on grain from these barge origins are substantially lower than they would be under an adjustment from all rail origins west of Chicago of the same average level but made on a distance scale where the outbound balances or proportionals would vary inversely with the length of the inbound and through hauls.

So far as the rail carriers are concerned, the grain originates at numerous so-called country grain elevators located throughout the origin territory requiring an inbound truck haul from the farms ranging from only a few yards to about ten miles, with a truck charge or cost ranging from 0.9 to 1.8 cents. The all-rail traffic requires only one intermediary between the farmer and the dealer at the primary market or gateway, namely, the country elevator operator, whose average margin is about 4.4 cents. This margin and the inbound truck cost is incurred on all of the all-rail traffic. Where the traffic is stopped in transit, there are additional charges for elevation and dealer's margin, such charges at Chicago being 1.6 cents and 2.25 cents, respectively. The net price to the farmer on grain shipped to the Chicago market is usually determined by deducting the inbound truck cost, rail rate and the country elevator margin from the Chicago price.

From certain origins in northern Illinois and northeastern Indiana to the Illinois portion of the Chicago switching district so-called lake local rates from 3 to 4.5 cents lower than the interstate local rates have been voluntarily established by the inbound rail carriers to meet truck and water competition. The inbound tariffs specifically provide that these lake local rates shall not engage the outbound proportional rates. The lake locals are in most instances lower than 8.5 cents as, for example, from Morris, Seneca, and Ottawa, and in such instances would not engage the
32 proportional rates to trunk-line and New England territories under the above-quoted fourth-section rule, even in the absence of the inbound provision. They are used in connection with through interstate traffic only by the payment of an additional amount sufficient to bring the total up to the through interstate rate. Grain backed by lake local billing, as the name implies, may be shipped out of Chicago by lake during the period of open navigation from about May 1 to November 1. Such grain may also be shipped to local consumers in the Illinois portion of the Chicago district, without extra charge, or shipped beyond in the form of grain or grain products to consumers in central territory on payment of the balances of the joint rates above referred to. Up to the limits of the demand for these purposes, the dealers will normally accept such grain at Chicago without discount, except toward the close of the navigation season when the discount is generally 0.5 cent per bushel or 0.9 cent per 100 pounds under the Chicago price. From origins taking lake local rates, the traffic to Chicago is confined to rail movements under those rates or to movements by truck and barge. In other words, at such origins, the only buying competition, so far as Chicago dealers are concerned, is between the lake local traffic on the one hand, and the

truck-barge traffic, on the other. However, Chicago encounters competition at the Illinois origins from the all-rail and barge-rail routes to the South, most of the Illinois grain adjacent to the Waterway south of La Salle and all of it south of Naples being obtained by markets which lie towards the south.

The all-rail adjustment by providing for proportionals or outbound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assists them in maintaining a common price, thus facilitating hedging and other market operations. The all-rail traffic
33 consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and circuitous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points. It moves in boxcars with an average loading of about 50 tons on grain and a somewhat lighter loading on grain products. The present proportionals can be and are maintained in connection with the all-rail traffic and at the same time farmers and all others concerned accorded local and through rates for rail transportation aligned with each other.

THE LAKE-RAIL ADJUSTMENT

On lake-rail grain to official territory there are no joint rates whatsoever. Grain is transported by the lake carriers as a bulk commodity and the rates thereon are not subject to our jurisdiction. See section 303 (b) (c) of the Act. The normal inbound lake rate to Chicago from the principal origin ports at the head of the lakes, namely, Port Arthur and Port William, Canada, 686 miles, and Duluth, Minn., 808 miles, and from the head of the lakes and Chicago to the Lake Erie ports, is generally about 5 cents. On ex-lake traffic from Chicago, proportionals apply and have applied for many years to central territory the same as the ex-rail Northwest proportionals and to trunk-line and New England territories the same as the uniform ex-rail proportionals or specifics. Thus to trunk-line and New England territories the lake-rail combination via Chicago averages about 29 cents or 3.5 cents lower than the local rates from Chicago. The above-quoted fourth-section rule does not apply in connection with the lake-rail traffic. However, grain moving from the head of the lakes requires a substantial inbound haul by rail, and consequently the rail-lake-rail combinations are considerably higher than the local rates from Chicago.

34 The ex-lake proportionals to trunk-line and New England territories from Chicago are somewhat lower in terms

of first class, than those from the Lake Erie and Hudson River ports, as appears from the following table:

From—	Distance	Average ex-lake rate	Relation to first class
	Miles	*Cents*	*Percent*
Chicago, Ill	771	24.0	15.8
Buffalo, N. Y	387	17.7	16.5
Oswego, N. Y	332	16.3	16.8
Albany, N. Y	291	16.7	17.6

With approximately the same inbound lake rates, the lake-rail combinations via Chicago are much higher than via the other ports. Lake-rail grain from the Northwest to trunk-line and New England territories does not have to move via Chicago. Insofar as the lake grain is concerned, Chicago is primarily an outbound port, its inbound lake shipments being relatively small even in normal times. Even this small volume is attracted to Chicago under its present ex-lake proportionals only because dealers there can use grain backed by lake billing without discount in their marketing and hedging operations, and as such proportionals apply to and through points in central territory, dealers and processors at those points may ship their grain or products at the outbound balance of the proportionals to trunk-line and New England territories.

Unlike the all-rail traffic, the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading, and requires a full-origin terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation. The inbound-lake movement consists chiefly of wheat moving for relatively long distances. The
35. rail-lake-rail combinations are in substantial conformity with fourth-section principles.

To trunk-line and New England territories, the ex-lake rates from Buffalo, averaging 17.7 cents or 16.5 percent of first class, apply not only on lake traffic from the Northwest but also on barge-lake traffic moving via Chicago. The proposed schedules would make no change in the rates from Buffalo but would increase the ex-barge rates from Chicago to an average of 32.5 cents or 21.4 percent of first class. This would create an unjustified disparity which will be avoided by the proportionals herein prescribed on the ex-barge traffic from Chicago averaging 27 cents or about 17 percent of first class.

THE BARGE-RAIL ADJUSTMENT

On barge-rail grain to official territory there are likewise no joint rates whatsoever. The Federal Barge Line serving Kansas City and the Mechling Barge Line serving the Illinois origins are common carriers and their port-to-port rates are on file with us. Such rates are subject to our jurisdiction except those of Mechling in instances where not more than three kinds of grain are transported in a given tow. However, Mechling has found it impracticable to maintain different rates on the exempt and non-exempt traffic. As appears from Appendix A, Tables IV and V, the barge rates on grain to Chicago are from 7.5 to 9.25 cents lower than the interstate local rates from the Illinois origins and 15.5 and 6.5 cents lower than the rail local and proportional rates, respectively, from Kansas City. They are subject to minima of 200 tons on oats, and 350 tons on other grain from the Illinois origins, and 1,000 tons from Kansas City. The rate on grain products from Kansas City is subject to the usual carload minimum and includes transfer to railroad cars at Chicago. On grain, the barge
36 carriers perform very little terminal service, such service consisting merely of placing the empty barge under the marine leg of the elevator at the river origin and the loaded barge under the marine leg of the terminal elevator at the gateway. Federal has a terminal at Chicago where it can transfer the products to cars. It can transfer grain from barge to cars at this terminal by means of a clam-shell, but is never called upon to do so. Mechling handles bulk grain only and does not own or operate a terminal or other transfer facility at Chicago. Thus, the barge service under the grain rates consists solely of towing the loaded barge from point of loading to point of unloading. The barge rates yield fair returns to the barge carriers and for the purpose of this proceeding may be accepted as reasonable.

As early as 1886 there was an inbound movement of grain to Chicago by the old Illinois-Michigan Canal. That movement continued until about 1907, when the barge service was discontinued until restored in 1933. Protestant-petitioners assert that from 1886 to 1907 ex-barge grain from Illinois was on the same basis as Illinois ex-rail grain but as all-rail grain from Illinois to the East, as seen above, moved on combinations of locals prior to 1905 and one-factor rates on a non-specific plan from 1905 to 1907, the significance of this assertion is not apparent. From 1933 to the present time, the ex-barge proportionals have been on a parity with the ex-lake proportionals and certain of the ex-rail proportionals or specifics.

To trunk-line and New England territories, the ex-barge proportionals are the same as the uniform ex-rail proportionals or

specifics. To central territory, the ex-barge rates from the Illinois origins are the same as the Northwest proportionals, and from Kansas City the same as the Trans-Mississippi proportionals.

The barge-rail combinations are not made subject to the
37 above-quoted fourth-section rule and from Illinois are generally far below the local rates from Chicago and also lower than the local rates from numerous intermediate origins in central territory, constituting numerous and extreme departures from the long-and-short-haul provisions of section 4 of the Interstate Commerce Act. For example, from Morris, they are lower than the local rates on domestic grain to trunk-line and New England territories from all central territory origins west of a line running south from Amadore, Mich., through Oxford, Mich., just west of Hudson, Mich., thence east of the Ohio-Indiana State line south to a point just west of Cincinnati, Ohio. They are also lower than the local rates on export grain from all central territory origins west of a line from Erie, Pa., south through Meadville, thence via Johnsonburg, to Altoona, Pa. The barge-rail rates are far below the all-rail rates from the same and other Illinois origins. This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins and it is difficult to see, with such extreme disparities, how such requests could properly be denied. As shown by Appendix B, Table I, there is a substantial production of corn in central territory. While the farmers therein did not appear at the hearing to show that they were hurt by this situation, such evidence was adduced by others in the same relative position, namely, the associations of private and farmer co-operative elevator companies at numerous rail origins in Illinois. This is what is meant by the statement in the prior report that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure. This demonstrates the inconsistency of the position of protestant-petitioners, namely, that the ex-barge traffic be accorded the same rates but not subjected to the same rule as the ex-rail traffic. This fourth-section situation does not exist
38 in connection with the barge-rail rates from Kansas City, which to trunk-line and New England territories average 33.5 cents on grain and 35.5 cents on the products, composed of 9.5 and 11 cents inbound, and 24 and 24.5 cents outbound, or 1 and 2.5 cents, respectively, higher than the local rates from Chicago. Like the lake traffic from the Northwest, the barge traffic from Kansas City is usually preceded by a rail haul.

The barge movement from the Illinois origins consists chiefly of corn moving for relatively short distances. The barge movement from Kansas City consists chiefly of wheat moving for relatively long distances, but very little has moved to Chicago

during recent years on account of scarcity of barges and channel difficulties.

Inbound to Chicago, as compared with the direct rail hauls, the barge hauls are slightly longer from the Illinois origins and substantially longer from Kansas City. From the Illinois barge origins the all-rail routes via Chicago to New York, as illustrative of trunk-line and New England territories are from 3.2 to 9.1 percent longer than the direct all-rail routes. Thus, to New York the rail haul from Chicago (890 miles) in connection with the barge-rail rates, as compared with the haul over the direct all-rail routes, is 30 to 155 miles shorter, which represents the net saving in direct rail-transportation resulting from the substitution of barge hauls, ranging from 64 to 262 miles. To the Ohio River crossings and other destinations in the southern portion of central territory the circuity via Chicago is substantially greater and the net saving in direct rail transportation accomplished by the barge service is correspondingly less. It is true that from origins in northwestern Illinois (north and west of the Chicago-Peoria-Fort Madison, Iowa, line), the all-rail grain moves to northern central and trunk-line and New England territories principally via Chicago or Chicago junctions, which may be said to be reasonably direct hauls. But from the many Illinois origins south and east of that line, the direct routes are not via Chicago. In this connection, it should be noted that, on grain moving from these and central territory origins over their direct single-line routes, respondents obtain the entire amount of the through rates or of local rates which harmonize therewith. Whether the direct route be single or joint, the line-haul service which they perform beyond the Chicago junctions on traffic to the southern portion of central territory is substantially less than the service they perform out of Chicago.

39.

Like the lake-rail traffic, the barge-rail traffic requires transfer of lading and a full origin terminal service at the interchange port. In other words, it never moves in continuous through transportation. Protestant-petitioners contend that the fact that the barge-rail traffic must always be stopped at the gateways does not mean that the outbound rail carrier performs any greater transit service in the aggregate on the ex-barge than on the ex-rail grain. They refer to Export Grain, C. F. A. Territory to North Atlantic Ports, 235 I. C. C. 655, in which division 3 found that the amount of export grain moving through Chicago without transit was negligible and point out that on domestic grain the stop at Chicago may simply be in lieu of a stop at Indianapolis or other terminal market east thereof. The western factors of the through rail rates include not to exceed three transit services without additional charge and to the extent that the all-rail ship-

ments receive transit on the inbound movements to the gateways there is less demand on the eastern carriers to perform transit service thereon. This record shows that there is a very substantial volume of domestic grain and grain products moving from points west of the gateways to the East without transit at the gateways or points east thereof. That such through movements by rail are substantial is shown by the statistics set forth in Appendix B hereto coupled with the fact that official territory consumes as grain or products about 156,000,000 more bushels annually than it produces. Moreover, all-rail grain may be, and frequently is, marketed and processed at Chicago under one transit operation, which avoids the necessity for processing at an intermediate point east thereof. Transit is not available under the inbound barge rates. Barge-rail grain is marketed but not processed at Chicago. To be processed before final destination it must be transited at some point beyond Chicago. It follows that respondents are called upon to perform more transit service, on the average, on the ex-barge than on the ex-rail traffic.

A trimming expense of 0.7 cent per 100 pounds is incurred in connection with the barge-rail grain. There are, of course, relatively few origin elevators for the barge grain, located on the Waterway only. The margin for these elevators at the Illinois barge origins averages about 2.68 cents. In the case of one of the protestants, operating Waterway elevators at Morris and Seneca, Ill., this represents a net profit of 1.34 cents, which is returned in the form of dividends to its stockholders. The stockholders are 14 private and 15 farmer cooperative elevator companies located within 40 miles of Morris. Certain of the other protestants, on account of competition, have been forced to forego profits from their elevators at the Waterway origins, which are maintained as auxiliaries of their Chicago houses.

Grain is trucked to the Waterway elevators at the Illinois origins from farms as far distant as 77 miles, the relative proportions for the various distances being set forth in Appendix B, Table IV, showing the total of the truck, barge, and trimming charges, as compared with the rail interstate and lake local rates. In this comparison, no allowances are included for the inbound truck charges to the elevators in connection with the rail traffic. Although the barge grain from the Illinois origins does not move through the country rail elevators, it is generally purchased through the operators thereof, who are allowed the same margin as on the rail grain, namely, 4.4 cents. Such operators guarantee the delivery of the grain and also assume all risks of liens thereon. It would be difficult, if not impossible, for a river-bank elevator to deal directly with individual farmers if any large territory were served, and buying from such operators cuts telephone costs. Such

operators also see to it that there is an orderly delivery of grain to the river-bank elevator so that the latter will not become congested. The elevator charges and dealer's margin at Chicago are the same as on transit rail grain, namely, 1.6 and 2.25 cents, respectively.

The proportionals from Chicago on the ex-barge grain being substantially the same as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billing and to utilize such grain in their hedging operations. The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic. Where the deductions are less on the barge than on the rail traffic the net price to the farmer is correspondingly greater, the difference diminishing as distance from the Waterway increases until finally it disappears altogether. On September 15, 1942, the river elevator price of corn per bushel at Morris and LaSalle (with rates to Chicago of 2 and 2.75 cents by barge and 9.5 and 12 cents by rail) was 81 cents or 3 and 4 cents higher than the rail elevator
42 price at Plano and Ashkum, Ill., respectively, with the same rail rates to Chicago. On September 15, 1943, the river elevator price at Morris and Havana (with barge rates of 2 and 4.25 cents and rail rates of 9.5 and 12 cents) was 105 and 102.4 cents, or 5 and 4.25 cents higher than the rail elevator price at Plano and Gibson City, Ill., respectively, with the same rail rates to Chicago. The rail rates just referred to are the interstate rates. No benefit from the barge transportation accrues to the farmers depending on the Kansas City market, as the price they receive based on that market is the same irrespective of whether the grain moves out-bound by barge or rail.

From Kansas City to the East, barge-rail grain, as compared with direct shipments of all-rail grain, requires an additional expense at Chicago of 3.25 cents for trimming, weighing, and inspection. There is only one river elevator at Kansas City. Barge shipments from rail elevators there must bear additional switching charges of $6.93 or $8.91 per car, and a transfer charge from car to barge of 39 cents per net ton. At Chicago, the elevators are generally served by both rail and water, but local processors there can obtain rail delivery of barge-grain only by the payment of a switching charge ranging from 3.25 to 4.5 cents per 100 pounds.

The primary interest of the Illinois farmer having access to the Waterways is in the greater net price above referred to. The barge lines and the Waterway elevator operators and dealers are primarily concerned with the volume of traffic moving through their facilities.

Under the proposed schedules, the barge-rail combination on grain from Kansas City to the East, processed into flour at Cleveland, would average 42.5 cents, composed of the 9.5-cent barge rate to Chicago, plus the average local rate beyond of 33 cents on grain products, while the barge-rail combination on flour milled at Kansas City would continue at an average of 35.5 cents, composed of the 11-cent barge rate on grain products to Chicago, plus the 24.5-cent rate on the products beyond. This creates an unjustified disparity which will likewise be avoided by the proportional rates prescribed herein resulting in barge-rail combinations on this Cleveland and Kansas City traffic averaging 37 and 38.5 cents, respectively.

GENERAL DISCUSSION AND CONCLUSIONS

The principal questions presented on further hearing are whether the ex-barge traffic from Chicago is entitled to proportionals lower than the local rates, and if so, how much lower.

To trunk-line and New England territories, protestant-petitioners contend that as the ex-rail and ex-lake proportionals or specifics are made uniformly 8.5 cents under the local rates, the ex-barge traffic is likewise entitled to uniform proportionals, regardless of origin, made 8.5 cents under the local rates or the same in amount as the ex-rail and ex-lake proportionals or specifics.

To central territory ex-barge grain from Illinois takes the highest of the three sets of proportionals. Protestants made no complaint against this at the original hearing, but on further hearing, the Illinois proportionals are proposed by certain protestant-petitioners and the Trans-Mississippi proportionals by others, for application on ex-barge grain from Illinois to this territory. Most of them propose that the Trans-Mississippi proportionals be continued on ex-barge traffic from Kansas City. But, as we have seen, to central territory, the ex-rail proportionals from Chicago being adjusted to equalize the various markets and routes, do not bear any consistent relation to the local rates therefrom and obviously are not designed to fit the barge-rail traffic via Chicago.

The Department and War Food Administrator propose ex-barge proportionals to central territory bearing the same percentage of first class as is borne, on the average, by the proportional rates to trunk-line and New England territories, namely, 15.8 percent. They point out that such proportionals would yield average earnings of 9.55 mills per ton mile, or substantially the same as the average yielded by all freight traffic of the western and eastern rail carriers in 1941. They also refer to the substantial increase in railway operating income for such carriers since the beginning

of World War II in 1939, and particularly since our entrance in the War in 1941. Evidence of this character is of little probative value in determining the reasonableness of the rates on a particular commodity. Grimes & Friedman v. Belt Ry. Co., 190 I. C. C. 32, 36; International Oil Co. v. Abilene & S. Ry. Co., 204 I. C. C. 783, 787.

Respondents propose ex-barge proportionals to trunk-line and New England territories one cent under the local rates, and to central territory 1.5 cents under the local rates.

Interveners contend that no justification is shown on this record for any rates on the ex-barge traffic lower than the local rates, and that therefore the prior findings should be affirmed.

Under the so-called relative service limitation, as will be shown hereinafter, the barge-rail traffic from the Illinois origins in most instances would not be entitled to joint rates lower than the combination of local rates. But that limitation was designed to cover instances where the expense of interchange between
45 the rail and water carriers would offset the lower cost of the water transportation. There would be no basis for such a limitation here for, as seen above, the barge service effects a saving in terminal service in connection with the inbound haul. Moreover, respondents themselves now concede that the ex-barge traffic is entitled to something lower than the local rates.

Under the proposed schedules the rates on the ex-barge traffic made on the full local basis, much higher than the ex-rail and ex-lake proportionals or specifics, would result in barge-rail combinations higher in some instances than the all-rail rates from the same origins. Under such a basis Chicago dealers could not use grain backed by barge billing in their marketing and hedging operations without a substantial discount in price. The record as amplified on further hearing shows that the proposed schedules would lessen and possibly destroy the barge-rail traffic to trunk-line and New England territories and also largely to central territory in view of the lake local, joint rate, transit, and discount situations above referred to. Whether they would restore the traffic to the all-rail routes is problematical. They might have the effect of diverting the grain from these northern Illinois origins to barge movements to the South. In any event, under the proposed schedules, the barge-rail traffic via Chicago would not have a fair opportunity to move in competition with the all-rail and lake-rail traffic.

We conclude that the ex-barge traffic is entitled to proportionals lower than the local rates.

In support of their contention that the ex-barge traffic is entitled to proportionals no higher than the ex-rail and ex-lake proportionals or specifics protestant-petitioners cite, among others, the five cases from which they quote the following paragraphs,

and which we now discuss. In N. Y. & N. Ry. Co. v. N. Y. & N. E. R. R. Co., 4 I. C. C. 702, we said:

"When, therefore, the statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the statute it is only a meaningless enactment."

In Chattanooga Packet Co. v. I. C. R. R. Co., 33 I. C. C. 384, 392, we said:

"If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters."

The latter statement was quoted, with approval, by Division 3 in Restriction on Proportional Rates, 161 I. C. C. 113, and Ex-River Grain and Grain Products to Mississippi Valley, 177 I. C. C. 206, and by Division 4 in Raw Sugar, New Orleans to Gramercy and Reserve, La., 206 I. C. C. 231.

To the extent that the above quotations mean that proportional rates should be so adjusted as to recognize the inherent advantages of each form of transportation, be non-destructive of either, and not unjustly discriminate as between the rail and water shippers and carriers we believe them to constitute a sound statement of principles. But if they are to be construed as meaning that ex-water proportionals must be the same as ex-rail proportionals, regardless of the differences in circumstances and conditions surrounding the all-rail and water-rail transportation, they are contrary, in that respect, to the findings of Division 3 in Ex-
47 River Grain from St. Louis to the South, 203 I. C. C. 385, in which petitions for reopening were denied by us, and were expressly overruled by the findings of the entire Commission and the Supreme Court in the instant proceeding.

Although it is well settled that when the lawfulness of proportional rates is in issue they are subject to the same criteria as other separately established rates, it is equally well settled that where such proportional rates are a part of a closely integrated rate structure, as in the case of grain, careful consideration must also be given to the relation of such proportional rates to the through rates and the other components thereof. Baltimore Chamber of Commerce v. B. & O. R. R. Co., 22 I. C. C. 596, 602; Fraser-Smith Co. v. Grand Trunk W. Ry., 185 I. C. C. 57, 62;

Grain and Grain Products, supra; Nebraska-Colorado Grain Producers Assn. v. C. B. & Q. R. Co., 243 I. C. C. 309, 313.

In our prior report herein, 248 I. C. C. 307, 311, we said:

"As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the inbound and through rates, and properly may vary according to the relative length and nature of the inbound and through service."

In upholding our order, the Supreme Court, among other things, said:

"Nowhere in the Act or in its legislative history is there any suggestion that from the mere fact that grain moving from beyond Chicago to New York travels by barge for the 60-mile leg of its journey to Chicago—less than one percent [sic] of the total haul—it shall as matter of law be entitled to a rate from beyond Chicago to the seaboard less than that from the Pennsylvania line to the seaboard.

* * * * * *

Nothing in the Interstate Commerce Act, as amended by
48 the Transportation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

* * * * * *

"The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport. It also seeks 'sound economic conditions' for all kinds of transportation. For more than a year after the enactment of this Act, and until after the Commission had finally disposed of the case, appellees showed no disposition to make proposals or to develop a record upon the basis of which the Commission might prescribe rates in view of their particular circumstances and under the provisions of the Act designed with reference to them. Instead they relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure."

Where, as here, ex-rail and ex-lake proportionals or specifics reflect average circumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals

may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.

The principal differences as shown by this record and described above may be summarized as follows:

1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway of junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory.

49 2. The inbound rail hauls of all of the traffic which engages the ex-rail proportionals are substantially longer, on the average, than the inbound barge hauls.

3. The rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic here considered, include:

(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of the gateways an average outbound factor which is a component part of many through rates of different amounts, which vary with the length of the inbound hauls and the western factors applicable thereto.

(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the inbound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways.

(c) The ex-rail proportionals or specifics, combined with the inbound interstate rates or specifics, result in through all-rail rates to official territory which harmonize with each other and with the local rates in that territory.

4. Lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul inbound and is usually preceded by an inbound rail haul. The rail-lake-rail combinations, in general, conform to the principles which underlie section 4. In these respects lake grain is like barge grain from Kansas City but unlike barge grain from Illinois. The trunk-line and New England territories, the lake-rail grain differs from all of the barge-rail grain moving through Chicago in that the lake-rail grain can and generally does by-pass that gateway entirely.

The uniform ex-rail proportionals or specifics here considered have the same characteristics and function as the inter-
50 market proportionals previous referred to in that both reflect an average of what would otherwise be balances of through all-rail rates, are components of the through all-rail rates, and have been recognized by us as such. Protestant-petitioners concede that they would be inappropriate for the ex-barge traffic.

if, like the intermarket proportionals, they had been prescribed by us instead of being voluntarily established by the respondent carriers. But, irrespective of how they were actually determined, it is their essential nature and function which is controlling here.

In determining how much lower the ex-barge proportionals should be than the local rates and how much higher than the ex-rail and ex-lake proportionals or specifics, consideration must be given to their effect on the movement of the traffic. The present combinations on the barge-rail traffic being so much lower than the all-rail rates from the same and other origins have diverted and will continue to divert a substantial portion of the traffic to the barge-rail routes via Chicago from the all-rail routes, including those through Indianapolis and other markets. This is due, in part, to the level of the barge rates. However, it is also partly due to the level of the present ex-barge proportionals. Respondents here are interested in the measure of those proportionals as outbound carriers from the gateways and as participating carriers over the other all-rail routes. Several of them are also inbound carriers, like the western rail carriers, directly competing with the barge lines. As to the ex-lake rates from Chicago, that these do not adversely affect those interested in the barge-rail traffic via Chicago is shown by the fact that if such ex-lake rates were increased, lake grain from the Northwest would continue to flow to the Lake Erie and Hudson River ports and those interested in the barge-rail traffic via Chicago would be no better off than before.

51 Commercial witnesses for protestant-petitioners estimated that differences ex-barge over corresponding ex-rail proportionals would curtail the barge traffic from Illinois as follows: 1 cent from 15 to 33⅓ percent; 2 cents from 45 to 66 percent; 3 cents, 80 percent; and 4 cents, 100 percent. The basis for this estimate is not clear. With the present seller's market it is admitted that grain can and does move very largely regardless of the rates, while in normal times Chicago encounters competition at the Illinois barge origins from the southern markets and at least two-thirds of the barge grain moving to Chicago moves outward by lake. Under the proportionals approved herein on the ex-barge traffic, it may be necessary to accord grain backed by barge billing some discount under the Chicago price, but certainly there is no reason why such discount should be as great as the increases resulting from such proportionals.

If the rates on the ex-barge traffic are adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto," the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traffics, thus preserving the inherent advantage of barge

transportation to the adjacent farm community and all others concerned, without any adverse effect on the wartime stabilization program or the effective use of the waterway.

In prior proceedings we have prescribed through barge-rail rates based on the so-called Ex Parte 96 formula, or modifications thereof, using percentage differentials under the local rail rates between the barge ports, or on a constructive distance basis, using one rail mile as the equivalent of from 2.25 to 3 water miles, depending on the circumstances and conditions surrounding the movement of the particular traffic. Through Routes and Joint Rates, 153 I. C. C. 129, 156 I. C. C. 141, 161 I. C. C. 207, 163 I. C. C. 716, 167 I. C. C. 385, 172 I. C. C. 525, 174 I. C. C. 477, 181 I. C. C. 675, 192 I. C. C. 173, 192 I. C. C. 663, Sugar from
52 Louisiana to Arkansas, 167 I. C. C. 710, Application of Mississippi Valley B. L. Co., 167 I. C. C. 41, 171 I. C. C. 37, 178 I. C. C. 224, 182 I. C. C. 512, Application of American B. L. Co., 182 I. C. C. 521, Cotton and Cotton Linters from South and Southwest, 183 I. C. C. 33, Application of Inland Navigation Co., 218 I. C. C. 393.

Such through barge-rail rates are subject to a fourth-section rule, namely, that the through barge-rail rate shall not be less than the local rate from the interchange port, and to a relative service limitation, namely, that no through barge-rail route need be established where the shortest rail distance from the port of interchange to the rail destination exceeds three-fourths of the shortest rail distance from the barge origin to that destination. On the principal traffic here considered, from Illinois to trunk-line—New England territory, the shortest rail distance from Chicago exceeds three-fourths of the shortest rail distance from each of the Illinois barge origins. If this relative service limitation were imposed here this ex-barge traffic from Illinois would not be entitled to proportionals lower than the local rates by any amount. Under the circumstances we think it should be relieved entirely from the relative service limitation.

If the ex-barge traffic from Illinois were made subject to the fourth-section rule but not to that limitation, it would be entitled to differentials under the local rates not exceeding the amount of the inbound barge rates, namely, differentials ranging from 2 cents on grain originating at Morris to 5 cents on grain originating at
Naples. Under section 6 (b)[3] of the Transportation Act,
53 1940, respondents are not required to increase their present

[3] This section appears on page 24 of our compilation of the Interstate Commerce Act and related sections of other acts, revised to April 1, 1941, and at 54 Stat. L. 904. The provision of that section referred to reads as follows:

(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section.

ex-barge proportionals to bring the barge-rail combinations in harmony with fourth-section principles. But this section cannot be construed as precluding respondents from increasing those proportionals to bring the barge-rail combinations more nearly into conformity with section 4. Since section 6(b) of the Transportation Act, 1940, protects the departures in the present adjustment it follows that it will protect any departures of lesser extent, such as those resulting from the rates approved herein.

The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same outbound proportionals if, as the Act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower inbound cost but, in addition, would extend to the barge-rail transportation most of the advantages of all-rail transportation. However, all of the ex-barge traffic can and should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practicable the commercial needs thereof, just as the ex-rail traffic, for similar reasons, has been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation. Protestant-petitioners ask that on the ex-barge traffic to trunk-line and New England territories we prescribe uniform proportionals regardless of origin. Under all the circumstances, such uniform ex-barge proportionals may be arrived at by averaging the balances to those territories under the w.t.l. scale from the respective barge origins, namely, 28.5 cents ex-Illinois, 26 cents ex-Kansas City considered alone, and 25 cents ex-Kansas City considering the prior rail hauls. We thus arrive at proportionals averaging 27 cents, and made uniformly 5.5 cents under the
54 local rates and 3 cents higher than the ex-rail and ex-lake proportionals or specifics. To trunk-line and New England territories the resulting barge-rail combinations will average about 5 cents less than the corresponding all-rail rates. Grading such proportionals back through central territory so as to fit the barge-rail traffic via Chicago and at the same time avoid any new fourth-section departures, we arrive at ex-barge proportionals to that territory averaging about 17 cents and ranging from 1 to 5 cents, and averaging 2.4 cents, under the local rates. To that territory the resulting barge-rail combinations will average 6.5 cents less than the all-rail combinations.

As shown in detail by Appendix A, Tables IV and V, the ex-barge proportionals prescribed herein will result in barge-rail combinations substantially lower in amount and in relation to the w.t.l. scale than the corresponding all-rail rates. The latter comparison is based on the constructive distances shown, using one rail mile as the equivalent of four water miles which is the ratio

of the present barge rates to the corresponding inbound (interstate) rail rates from the Illinois origins. This ratio and the spread or differential, barge-rail under all-rail, resulting from the basis herein prescribed, are considerably greater than those resulting from the joint barge-rail rates prescribed in the proceedings last cited, and fully reflect the contribution of this barge grain to the transportation economy as shown by the present record.

Peoria and St. Louis would, of course, be entitled, on reasonable request, to ex-barge proportionals properly aligned with those approved herein from Chicago, but the record does not contain sufficient detail for the prescription of such proportionals in this proceeding.

The Price Administrator requests, regardless of the merits
55 from a peacetime standpoint that no increases whatever be permitted in the ex-barge grain rates from Chicago until after the present war emergency, but there is no basis for granting this request, either in fact or in law.

FINDINGS

On further hearing:

1. We find that we should not prescribe joint rates on the barge-rail traffic above described.

2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein, under sections 1, 2, 3 (4), 3 (4), 6 (11) (b), and 15a (2) of the Interstate Commerce Act, administered with a view to carrying out the national transportation policy, will be those made differentially under the local rail rates which are or may be hereafter concurrently maintained from Chicago, as set forth below, with the customary differentials on the products and export traffic, and which are no less favorable to the ex-barge traffic and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other.

When local rail rates on grain is (cents):

13–14.
15–22.
23–24.
25–26.
27–28.
28.5 and over.

Differential, ex-barge under local rail rate, shall be (cents):

1.
2.
3.
4.
5.
5.5.

56 3. We further find that such ex-barge proportionals shall be subject to the same policing provisions as the ex-rail and ex-lake proportionals, but shall not be made subject to the fourth-section rule.

As the proposed schedules have not become effective due to the voluntary postponement by respondents of the effective date thereof, no order requiring establishment of the rates herein found lawful appears necessary at this time. An order will be entered requiring the cancellation of the proposed schedules, without prejudice to the filing of new schedules in conformity with the findings herein.

Commissioner MAHAFFIE concurs in the results.

MILLER, Commissioner, dissenting:

In my opinion we should not here prescribe proportional rail rates from Chicago for application on grain brought thereto by barge.

Under section 303 (b) of the Act we do not have jurisdiction over the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. The barge shipments here in issue are in bulk and the tow may consist of not more than three bulk commodities.

Undoubtedly, in many cases, the same shippers who forward grain to Chicago by barge carriers for shipment beyond by rail also ship grain by the same carriers to Chicago or other ports for local sale and disposition or for movement beyond by carriers other than rail. If the shipments receiving no subsequent rail transportation move to such ports in tows containing not more than three commodities in bulk, they are not subject to our jurisdiction and the barge carrier may make whatever charge it sees fit. Assuming that the barge-line rate on file with us to

57 Chicago is 8 cents per 100 pounds, there is nothing to prevent the barge line from charging, for example, a rate of only 6 cents on the traffic not under our jurisdiction and thereby accord the shipper an average rate of perhaps 7 cents on all of his traffic. A rail carrier, on the other hand, must publish and maintain its tariff rates on all grain and other traffic which it handles. If, in the illustration given, the rail rate is 10 cents, it is obvious that as long as the barge line is free to cut its average rate to the

shipper to 7 cents, or any other figure it may elect, its opportunity of obtaining the greater share of the traffic is enhanced. So long as this opportunity for rebating exists, I have much doubt whether a carrier, a part of whose grain traffic is not subject to the Act, can be considered, as to any of such traffic, a "common carrier by water subject to part III" for the purpose of here enforcing section 3 (4), 3 (1) or any of the other provisions of the Act cited in the findings of this report. Evidently, the cure for this condition is additional legislation giving us jurisdiction over such traffic.

Moreover, the report plainly indicates that on the average the rail carriers are put to a greater expense in connection with the interchange of this ex-barge grain at Chicago than is the case in the interchange of traffic delivered to Chicago by rail. Any extra expense connected with the interchange of this ex-water traffic should be borne by the barge lines. This record affords no basis for determining the amount of this extra expense. Therefore, even if we had jurisdiction over all the transportation of grain performed by these barge lines, we would still lack the evidence which is necessary to enable us to do justice between both the barge carriers and the rail lines in the prescription of rail proportional rates for application on this ex-barge grain.

58 ALLDREDGE, Commissioner, dissenting:

An error of a fundamental nature runs through the majority report. I cannot, therefore, agree with its conclusions. This error is plainly discernible when the results of the decision are examined in relation to the real issue presented by the record.

This proceedings was started by action of the eastern rail lines in an attempt to restrict their tariffs so that the eastbound proportional rates published therein on grain and grain products from Chicago would not in the future apply on such traffic when it originates along the Illinois Waterway and is brought into Chicago by barge or boat. The railroads acted in this matter entirely in their own interest. There was no shipper demand, so far as the record discloses, for any change in the proportional rates applicable on this ex-river traffic. The boat and barge competition on the Illinois Waterway, however, is the exclusive concern of the western rail lines terminating in Chicago. They are the only railroads that are competitive with boats and barges operating on this waterway. The railroads running east of Chicago, insofar as the movement of this particular traffic to its ultimate market is concerned, offer a supplementary service to the water lines as well as to the western railroads. They obtain the same rates and revenues irrespective of whether these commodities are delivered to them at Chicago by the western railroads or by boats and barges on the Illinois Waterway. If any railroads, therefore, are actually suffering from the competition of the boats and barges on this

waterway, it is the western and not the eastern railroads. Any need for revising the existing rates in issue here, if any such need exists, would spring from this one particular circumstance. In endeavoring to compose this situation, however, under the principles announced by the Supreme Court of the
59 United States in Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671, the majority has decided to increase the rates and revenues of the rail lines extending east from Chicago, even as far as New England—a wholly different set of carriers from those which feel the effects of the waterway competition. There is, therefore, no logical relation between cause and effect in the majority decision. The only real solution of the problem, if any solution is called for, is to establish minimum rates for the boats and barges operating on the Illinois Waterway so as to protect the western rail lines against the competition thus created. These western railroads, however, have not made out such a case on this record. The boat lines are apparently prospering under the rates which they are now charging, and there seems to be no reason for putting a floor under those rates.

If there is no justification for the increases in rates which the majority here extends to the eastern rail lines—and I do not think there is in the circumstances of this case—then those increases are unjust and unreasonable under section 1 of the act and the declared purpose of the national transportation policy under which all provisions of the act are to be administered, and should not be sanctioned.

But there is an additional restraint against the granting of such increases. Section 3 (4) of the act was clearly intended, among other things, to prevent discriminations in rates between connecting lines. It specifically includes water carriers subject to part III of the act. The boats and barges operating on the Illinois Waterway are such carriers. They are, therefore, entitled to the protection which section 3 (4) affords. I do not understand the decision of the Supreme Court in Interstate Commerce Commission v. Inland Waterways Corps., supra, to deny or even
60 to qualify that protection. That decision held, in effect, that we should look at all the circumstances and conditions surrounding the entire movement of the traffic in determining whether or not section 3 (4) has been violated. An examination of all such factors convinces me that what the rail carriers have been doing for the last dozen years with respect to these rates is about what section 3 (4) demands. The majority report will now materially change that situation. It will require higher rates to be charged east of Chicago on this ex-river traffic than will be charged on ex-rail traffic coming from the same area and on ex-

lake traffic moving into Chicago under similar conditions. There is no justification for such action. The eastern railroads have not shown a need for additional revenue or established the existence of any higher costs of consequence, terminal or otherwise, in the transportation of ex-river traffic than those incurred in the handling of ex-rail or ex-lake traffic of the same character. Since, however, this matter has come before us for review again, we might, in order to effect a more precise relation between ex-rail and ex-river grain traffic, reasonably and properly require that the ex-Illinois grain proportionals applying from Chicago to C. F. A. territory be applied also on this ex-river traffic rather than the ex-northwestern proportionals. That is the only change in the existing proportional rates maintained by the eastern rail lines that I believe the record supports.

One further complication is pointed out in the majority report in connection with violations of section 4 of the act by reason of the fact that the combinations of water and rail proportional rates on this grain traffic are lower than the local rail rates from Chicago to the same destinations. This condition exists in the present rates, and it will continue to exist, although in lesser degree, in the rates approved by the majority. The act, however, provides for relief from the operation of section 4 in
61 such circumstances if section 6 (b) of the Transportation Act of 1940 does not automatically take care of the matter. It seems entirely reasonable and proper to grant whatever relief from the rigid terms of section 4 that may be necessary to maintain the rates I have suggested.

I am authorized to state that Commissioner Lee joins in this expression.

PATTERSON, Commissioner, dissenting:

There are various features of the decision of the majority as to the propriety of which I have grave doubts, but I will confine my discussion here to the one which I regard as of controlling importance, namely, the fourth section situation.

From Morris, for instance, the barge rate to Chicago is 2 cents. The ex-barge proportional approved by the majority from Chicago to New York is 29 cents, making a through barge-rail rate of 31 cents. The local rate from Chicago is 34.5 cents. We, therefore, have a situation where on "like kind of property" the rate will be lower from a farther distant point than from a directly intermediate point, in contravention of section 4 (1) of the act. A similar result would be produced at all intermediate points east of Chicago where the local rate exceeds 31 cents.

In discussing this situation in Interstate Commerce Commission v. Inland Waterways Corporation, 319 U. S. 671, the Supreme Court said:

"To perpetuate the existing rate structure by sustaining the District Court's injunction would entail numerous and serious violations of § 4 (1).[23] Under that rate structure, ex-barge grain moved from Illinois River points to Baltimore, New York and Boston at combination rates lower than the local rates for domestic grain from all points in Central Territory west
62 of a Line running south from Bay City, Michigan, through Fort Wayne and Indianapolis, Indiana. So also did the ex-barge grain move out at combination rates lower than local export rates on grain from all points in Central Territory west of a line running southwardly and south along the Indiana-Ohio line; and lower than the local export rates on corn from all points in Central Territory west of a line between Paynesville and East Liverpool, Ohio, near the Pennsylvania line. Unlike the barge-rail rate, the all-rail rates are, as the Commission has found, in strict conformity with § 4 (1). Congress by the Transportation Act of 1940 amended § 4 (1), but nowhere in the Act or in its legislative history is there any suggestion that from the mere fact that grain moving from beyond Chicago to New York travels by barge for the 60-mile leg of its journey to Chicago—less than one percent of the total haul—it shall as matter of law be entitled to a rate from beyond Chicago to the seaboard less than that from the Pennsylvania line to the seaboard." [24]

It should be noted that the court was referring to the result of the adjustment as it exists today, under which the proportional rate on ex-barge traffic from Chicago to New York is 26 cents. Application of the 29-cent proportional approved by the majority would change the situation only in degree.

It is conceded in the report that the rates approved by the majority would contravene the fourth section, but it is indicated that this situation would be protected by section 6 (b) of the Transportation Act, 1940. Commissioner Alldredge, in his dissent, suggests that if section 6 (b) does not automatically take care of the matter, relief should be accorded under section 4 (1) of the act.

The relief provisions of section 6 (b) and 4 (1) are permissive and not mandatory. Section 6 (b) provides that a
63 change shall not be required to effect compliance with section 4 (1) in the circumstances described, and the latter section authorizes relief in special cases, upon application by the carrier. We are without authority to compel any carrier to seek or to accept fourth-section relief. Inland Waterways Corp. v. Alabama G. S. R. Co., 151 I. C. C. 126, 133; Roasted Coffee from

[23] See footnote 2, supra, for the text.
[24] Indeed, the legislative history shows that the water interests vigorously championed the long-and-short haul clause as a measure necessary to prevent ruinous competition.

Jacksonville to Southern Points, 248 I. C. C. 563, 568; Wheeler Lbr. Bridge & Supply Co. v. Missouri & A. Ry. Co., 251 I. C. C. 58, 59.

Under the findings of the majority respondents must continue the maintenance of rates which result in fourth-section departures, under relief which they have not sought and do not want, or, in the alternative, reduce the local rates from a large number of intermediate points, which rates are not here in issue and whose reasonableness is not here in question.

In a series of cases extending over a period of years the Commission has recognized sixth class (27.5 percent of first class) as a reasonable basis for the transportation of grain in official territory. The sixth-class rate from Chicago to New York is 46 cents, as compared with the local grain rate of 34.5 cents, which is 20.7 percent of the first-class rate of $1.67.

In these circumstances, I regard the alternative mentioned, namely, reduction of the intermediate rates, as theoretical rather than actual, and it is my view that, as a matter of practical fact, the majority report prevents respondents, against their will, from eliminating fourth-section departures, in contravention of the law.

APPENDIX A

RATES ON GRAIN, WITH DISTANCES

TABLE I.—*Average out-bound local and proportional rates*

From—	To central territory				To trunk line—New England	
	Local	Proportional			Local	Proportional
		T. M.	N. W.	Ill		
Chicago, Ill.						
Distance (miles)	248	248	248	248	771	771
Rate (cents)	19.4	14.1	16.1	15.7	32.5	20.0
Percent of first class	21.9	16.0	18.2	17.8	21.4	15.5
Over or under w. t. l. scale (cents)	+ 1	−4.9	−2.9	−3.3	−5.5	−14.0
Earnings:						
Ton-mile (mills)	15.64	11.36	12.98	12.66	8.43	6.22
Car-mile (cents)	78.2	56.8	64.9	63.3	42.1	31.1
Peoria, Ill.						
Distance (miles)	331	331	331	331		
Rate (cents)	22.2	16.0	17.2	16.9		20.0
Under w. t. l. scale (cents)	−.8	−7.0	−5.8	−6.1		
St. Louis, Mo.						
Distance (miles)	498	498	498	498		
Rate (cents)	28.1	18.0	18.3	18.3		28.0
Under w. t. l. scale (cents)	−1.9	−7.0	−6.7	−6.7		

[1] Based on 50 tons per car.

TABLE II.—*Local and proportional rates from Chicago, Ill., to representative destinations in official territory*

To—	Distance	Local rate	Proportional rates			
			T. M.	N. W.	Ill.	Ex-barge prescribed
	Miles	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
La Crosse, Ind	69	13	9	12	12	12
South Bend, Ind	85	13	10.5	13.5	12	12
Kentland, Ind	81	13	10.5	13.5	12	12
Oxford, Ind	102	13	10.5	13.5	12	13
Logansport, Ind	111	13	10.5	13.5	12	13
Kokomo, Ind	132	13	10.5	13.5	12	13
Terre Haute, Ind	177	13	13	14.5	12	13
Hartford, Mich	108	17	10.5	13.5	15	15
Fort Wayne, Ind	148	17	11.5	14.5	14	15
Battle Creek, Mich	156	17	11.5	14.5	15	15
Grand Rapids, Mich	177	17	13	13	15	15
Muncie, Ind	178	17	11.5	14.5	13	15
Indianapolis, Ind	181	17	11.5	14.5	12	15
Toledo, Ohio	210	17	12.5	15.5	15	15
Pontiac, Mich	263	17	14	14	15	15
Bay City, Mich	275	17	14	14	15	15
Port Huron, Mich.	315	17	16	16	15	15
Evansville, Ind	284	18	14	15.5	13	16
Lafayette, Ind	[illegible]	19	16	16	17	17
Richmond, Ind	21[illegible]	19	11.5	14.5	13	17
Reed City, Mich	230	19	16	16	17	17
Frankfort, Mich	242	20	17	17	19	18
Sandusky, Ohio	277	20	13.5	16.5	19	18
Cleveland, Ohio	342	20	15.5	18.5	19	18
Cincinnati, Ohio	283	20.5	12.5	15.5	13.5	18.5
Jeffersonville, Ind	291	20.5	14	15.5	13.5	18.5
Traverse City, Mich	282	22	18	18	19	20
Louisville, Ky	291	22	16	17.5	15	20
Provemont, Mich	303	24	20	20	20	20
Cuyleville, Ohio	321	25	14.5	17.5	19	21
Mackinaw City, Mich	391	25	20	20	22	21
Youngstown, Ohio	356	25	16.5	19.5	19	21
Portsmouth, Ohio	396	25	16.5	19.5	19	21
Pittsburgh, Pa	454	28.5	18.5	21.5	20	24
Charleston, W. Va	461	28.5	18.5	21.5	20	24
Buffalo, N. Y	498	28.5	18.5	21.5	20	24
York, Pa	729	31.5	23	23	23	26
Baltimore, Md	767	31.5	23	23	23	26
Philadelphia, Pa	814	32.5	24	24	24	27
Albany, N. Y	789	33.5	25	25	25	28
New York, N. Y	900	34.5	26	26	26	29
Boston, Mass	973	36.5	28	28	28	31

66 TABLE III.—*Factors west of, and through rail rates via, Chicago from States indicated (and comparisons with w. t. l. scale)*

From—	Factors west of Chicago							To central territory			To trunk line—New England			
	To first market		Intermarket		Total		W. t. l. scale	Distance	Through rate	W. t. l. scale	Distance	Through rate	W. t. l. scale	
													Rate	Balance [1]
	Miles	Cents	Miles	Cents	Miles	Cents	Cents	Miles	Cents	Cents	Miles	Cents	Cents	Cents
Iowa					337	20.6	23	585	34.7	31	1108	44.6	49	26
Missouri					382	22.5	24	630	36.6	33	1153	46.5	50	26
Minnesota	83	12.7	[2] 400	13	483	25.7	28	731	41.8	36	1254	49.7	53	25
Nebraska	154	14.9	[3] 476	16	630	30.9	33	878	45.0	41	1401	54.9	58	25
South Dakota	260	20	[2] 400	13	660	33.0	34	908	49.1	43	1431	57.0	58	24
Kansas	275	18.9	[4] 436	16	711	34.9	36	959	49.0	45	1482	58.9	60	24
Colorado	514	26.8	[4] 436	16	950	42.8	44	1198	56.9	51	1721	66.8	67	23

[1] Increment in scale rate for distance beyond Chicago.
[2] From Minneapolis, Minn.
[3] From Omaha, Nebr.
[4] From Kansas City, Mo.

67 TABLE IV.—*In-bound rail factors and average all-rail combinations via Chicago from barge origins indicated*

From—	To Chicago		To central territory			To trunk line—New England				
	Rail distance	Rail rate	Distance	Combination through rate	W. t. l. scale	Distance	Combination through rate	W. t. l. scale		
								For inbound distance	For through distance	Balance [1]
	Miles	Cents	Miles	Cents	Cents	Miles	Cents	Cents	Cents	Cents
Morris, Ill	59	[2] 9.5	307	25.2	22	830	33.5	9.5	40	30.5
Seneca, Ill	69	[2] 9.5	317	25.2	22	840	33.5	10.5	40	29.5
Ottawa, Ill	82	[2] 10.0	330	25.7	23	853	34.0	13.0	41	28.0
La Salle, Ill	95	[2] 12.0	343	27.7	23	866	36.0	13.0	41	28.0
Henry, Ill	120	12.0	368	27.7	24	891	36.0	14.0	42	28.0
Lacon, Ill	122	12.0	370	27.7	24	893	36.0	14.0	42	28.0
Chillicothe, Ill	131	12.0	379	27.7	24	902	36.0	14.0	42	28.0
Peoria, Ill	146	12.0	394	27.7	25	917	36.0	15.0	43	28.0
Havana, Ill	180	12.0	428	27.7	26	951	36.0	15.0	43	28.0
Naples, Ill	250	13.0	498	28.7	28	1021	37.0	17.0	45	28.0
Kansas City, Mo. [3]	436	[4] 25.0	684	[4] 39.1	35	1207	[4] 49.0	19.0	47	28.0
Kansas City, Mo. [4]	436	[4] 15.0	684	[4] 30.1	35	1207	[4] 40.0	26.0	52	26.0
								26.0	52	26.0

[1] Increment in scale rate for distance beyond Chicago.
[2] Lake local rates are 5 cents from Morris, 5.5 cents from Seneca and Ottawa, and 9 cents from La Salle.
[3] Local.
[4] Proportional.

89 TABLE V.—*Barge rates to Chicago, and average barge-rail combinations via Chicago, present, proposed and prescribed (with constructive through distances and comparisons with w. t. l. scale)*

From—	To Chicago		To central territory					To trunk line—New England				
				Barge-rail combination					Barge-rail combination			
	Barge distance	Barge rate	Distance (constructive) [1]	W. t. l. scale	Present	Proposed	On prescribed basis	Distance (constructive) [1]	W. t. l. scale	Present	Proposed	On prescribed basis
	Miles	Cents	Miles	Cents	Cents	Cents	Cents	Miles	Cents	Cents	Cents	Cents
Morris, Ill	64	2.0	264	20	18.1	21.4	19.0	787	38	26.0	34.5	29.0
Seneca, Ill	75	2.25	267	20	18.35	21.65	19.25	790	38	26.25	34.75	29.25
Ottawa, Ill	88	2.5	270	20	18.6	21.9	19.5	793	39	26.5	35.0	29.5
La Salle, Ill	104	2.75	274	21	18.85	22.15	19.75	797	39	26.75	35.25	29.75
Henry, Ill	132	3.5	281	21	19.6	22.9	20.5	804	39	27.5	36.0	30.5
Lacon, Ill	139	3.5	283	21	19.6	22.9	20.5	806	39	27.5	36.0	30.5
Chillicothe, Ill	147	3.5	285	21	19.6	22.9	20.5	808	39	27.5	36.0	30.5
Peoria, Ill	165	4.0	289	21	20.1	23.4	21.0	812	39	28.0	36.5	31.0
Havana, Ill	208	4.25	300	22	20.35	23.65	21.25	827	40	28.25	36.75	31.25
Naples, Ill	262	5.0	313	22	21.1	24.4	22.0	836	40	29.0	37.5	32.0
Kansas City, Mo.[2]	722	9.5	428	26	27.6	28.9	26.5	951	45	33.5	42.0	36.5
Kansas City, Mo.[2]	722	11.0	428	26	25.1	25.1	28.0	951	45	35.5	35.5	38.5

[1] Based on one-fourth of barge distance to Chicago plus average rail distance beyond.
[2] Grain products.

APPENDIX B

PRODUCTION-SHIPMENT STATISTICS

TABLE I.—*Production of corn and wheat in 1942, in thousands of bushels*

State or group of States	Corn	Wheat
Illinois	433,438	12,819
Wisconsin	108,544	1,717
Iowa	596,796	4,749
Missouri	146,899	9,085
Minnesota	207,190	23,170
Nebraska	242,708	69,908
North Dakota	29,000	149,844
South Dakota	103,214	45,274
Kansas	90,060	206,775
Colorado	19,138	27,848
Montana	3,800	73,783
Wyoming	2,013	4,288
Far West	9,421	111,856
Southwest	179,512	109,863
Total	2,166,733	850,928
Central territory	486,199	66,749
Trunk-line territory	147,677	38,831
New England	8,292	40
Southeast	366,253	24,679
Total	1,008,421	130,299
Grand total	3,175,154	981,227

70 TABLE II.—*Receipts of corn and wheat at principal markets in 1942, in thousands of bushels*

Market	Corn	Wheat
Chicago, Ill	105,817	20,529
Milwaukee, Wis	10,237	1,698
Peoria, Ill	44,582	4,936
St. Louis, Mo	26,042	11,880
Kansas City, Mo	38,610	73,820
St. Joseph, Mo	7,839	10,546
Wichita, Kans	42	22,245
Hutchinson, Kans	3	37,140
Omaha, Nebr	24,849	18,358
Sioux City, Iowa	12,161	5,474
Minneapolis, Minn	19,169	138,708
Duluth, Minn	12,841	58,976
Indianapolis, Ind	26,664	5,272
Detroit, Mich	2,000	1,787
Buffalo, N. Y.:		
Ex-rail	32,312	72,846
Ex-lake	13,929	74,228

71 TABLE III.—*Grain in and out of Chicago 1940–1943, in thousands of bushels*

Grain and year	Lake		Barge		Rail		Truck
	In	Out	In	Out	In	Out	In
Year 1940:							
Corn		38,895	16,266		71,918	27,329	4,943
Wheat	2,636	6,817	2,773		22,367	13,470	388
Oats	402	102	174		17,690	16,130	278
Soybeans	120	153	753		8,804		233
Year 1941:							
Corn		23,403	15,349		81,717	43,576	3,100
Wheat	1,404	1,709	1,695	688	18,411	11,945	540
Oats		350	211		19,840	15,671	808
Soybeans		152	442		11,541	3,629	539
Year 1942:							
Corn		12,620	15,094		88,482	51,126	2,241
Wheat	863	212	550		18,885	24,018	231
Oats	730		53		18,156	18,019	211
Soybeans			197		9,125	3,519	462
Year 1943 (first 10 months):							
Corn		5,133	10,788	77	66,570	44,137	698
Wheat		3	31		36,616	34,555	68
Oats	3,710		161	205	14,886	13,789	52
Soybeans					15,681	3,901	95

72 TABLE IV.—*Analysis of barge corn shipped to Chicago for representative period during 1942–1943*

Country stations (number)	Distance	Truck	Total truck barge	Rail rates		Bushels
				Interstate	Lake local	
	Miles	*Cents*	*Cents*	*Cents*	*Cents*	
6	1.0–12.0	0.9–1.8	3.40–6.75	9.5–12	5–9	2,826,959
17	3.0–15.0	2.2–2.7	5.40–6.70	9.5–12	5.5–9	2,834,052
59	8.0–26.0	3.1–3.6	5.80–8.55	8.5–13	5.5–10	8,765,679
37	20.0–41.0	4.0–4.5	6.70–7.95	9.5–12	6–10.5	1,838,297
13	17.7–46.0	4.6–5.4	7.60–8.85	10–13	5.5–10	913,828
4	21.3–40.0	5.8–6.3	9.25–9.75	12	8.5–10.5	137,212
2	83.1	7.1	10.55	12	10	1,891
1	57.6	8.9	12.35			13,267
4	77.2	12.5	15.95	12–13	11–12	53,699
143	1.0–77.2	0.9–12.5	3.40–15.95	8.5–13	5–12	16,382,314

Recapitulation by Barge Origins

Origin	Bushels
Morris, Ill	7,222,674
Seneca, Ill	2,137,219
La Salle, Ill	4,496,882
Ottawa, Ill	2,007,394
Hennepin, Ill	369,426
Henry, Ill	142,042
Chillicothe, Ill	139,562
Havana, Ill	49,036

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ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of February, A. D. 1945

INVESTIGATION AND SUSPENSION DOCKET NO. 4718

GRAIN PROPORTIONALS, EX-BARGE TO OFFICIAL TERRITORY

It appearing, That by order dated October 14, 1939, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until May 15, 1940; and that, subsequently, by voluntary action of respondents, the effective date of said schedules was postponed pending the outcome of the further hearing referred to herein;

It further appearing, That Division 2, on July 31, 1941, issued its original report and order, and the Commission, on December 1, 1941, issued its report and order on reconsideration, and that on petition of certain interests, the Commission, by order dated July 13, 1943, reopened said proceedings for further hearing for the purposes enumerated in said order of that date;

And it further appearing, That such further hearing has been held, and full investigation of the matters and things involved has been made, and the Commission having, on the date hereof, made and filed its report on further hearing containing its findings of fact and conclusions thereon, which report, together with said reports of July 31 and December 1, 1941, are hereby referred and made parts hereof:

74 It is ordered, That respondents herein be, and they are hereby, notified and required to cancel said schedules, on or before April 5, 1945, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that this proceeding be discontinued.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

75 *Exhibit B to complaint*

Before the Interstate Commerce Commission

I. & S. Docket No. 4718

GRAIN PROPORTIONALS, EX-BARGE TO OFFICIAL TERRITORY

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING UNDER RULE 101 (E)

The report of the Commission was issued under date of December 1, 1941, 248 I. C. C. 307, and the opinion of the Supreme Court has just been issued on June 14, 1943, Volume 11, United States Law Week, page 4482 and the following.

The decision of the Supreme Court is that the lawfulness of the proposed rate schedules has not been determined by the Commission, nor by the courts. (The dissenting opinion proceeds on the ground that it was not within the discretion of the Commission to limit its action to rejection of a specific legal criticism made by those who were parties before it at the time when the record was made on the facts, prior to the taking effect of the Transportation Act of 1940; and it states considerations bearing upon the lawfulness of the proposed schedules under the Transportation Act of 1940.)

76 Fundamental questions are raised by the proposed schedules if they are judged under the Transportation Act of 1940 and particularly by the proposed differentiation by rail carriers in respect of their rates between the traffic of connecting carriers by water and that of connecting carriers by rail; and it is in the interest of rail carriers, water carriers, the shipping public and the war effort, that these questions should not be left indefinitely in suspense but should be determined with all convenient speed.

Such petition was not previously filed for the reason that certain expressions of the Commission especially mentioned by the opinion of the Supreme Court had led the petitioner to believe that the Commission had passed on the lawfulness of the proposed rates under the Transportation Act of 1940.

Wherefore leave is requested to file the attached petition.

Respectfully submitted,

EDWARD B. HAYES,

Attorney for A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line.

Before the Interstate Commerce Commission.

I. & S. Docket No. 4718.

GRAIN PROPORTIONALS, EX-BARGE TO OFFICIAL TERRITORY.

PETITION FOR REHEARING AND FOR AN ORDER FIXING SPECIFIC RESHIPPING RATES ON EX-BARGE GRAIN.

Reference is made to the report and order of the Commission on reconsideration, 248 I. C. C. 307, and the opinion of the Supreme Court, and dissenting opinion, June 14, 1943, Volume 11, United States Law Week, page 4482 and following.

The Supreme Court has decided that it was in the discretion of the Commission to dispose of the I. & S. proceeding on the ground that the fundamental legal proposition advanced by the protestants before it at the time when the evidence was heard, was an erroneous one.

The Commission stated that argument, and the Court adopts the Commission's statement of it: "To adopt protestant's premise would mean that all proportional rates differing from each other according to the length and nature of the inbound haul, would have to be condemned."

The court's opinion likewise reflects the thought that to decide the new issues prescribed under Section 3 (4) as amended in 1940 and the new National Transportation Policy, upon a record made and closed before the act was approved under which those issues arose, would be unfortunate, and in this connection the Court relies upon and quotes language of the Commission's report on reconsideration suggesting that on a proper record, by which we understand a record made with reference to the situation under the Act as amended in 1940, Commission action might well be taken to prescribe proportions for ex-barge grain.

The Supreme Court emphasizes that the proposed schedules have not been approved as lawful—not by the Commission, nor by the Court. The Court points out that notwithstanding anything that has been done here or by the Court, the proposed rates are still open to the charge of unlawfulness, and thus to reparation proceedings should that charge be sustained in any future proceeding under the Interstate Commerce Act as amended in 1940.

It goes without saying that the question of what rates may lawfully prevail on the rail portion of this important barge-rail movement should be determined as speedily as possible. The dissenting opinion in the Supreme Court was written on the premise that the lawfulness of the proposed schedules had been determined and therefore was before the Court. Whatever may be thought of the

attitude that the Court would take in a case in which all or a majority of the Justices agreed that the lawfulness of the proposal was presented (and the considerations pointed out by the dissenting opinion, that would become pertinent in that situation, are suggestive) perhaps there will be no disposition to deny that the proposed schedules arouse very grave doubts of their validity under tests that lie within the scope of the action of the Commission under the Interstate Commerce Act as amended in 1940.

The record already made before the Commission covers, in part, the field that would necessarily be explored by any record made on the issues of the invalidity of the proposed
79 rates on the grounds here advanced, and on the level of rates that should prevail for ex-barge grain; and if that record were available would pro tanto expedite the proceeding. (Indeed, it would seem from the Court's opinion that a different legal position by protestants on that same record would require further action of the Commission, since the effect of the Commission's action hitherto is limited by the Court to denial of the legal position taken by those who were parties before it when that record was made.). No good purpose would be served by delaying the determination of (1) the lawfulness of the proposed schedules, (2) the rates that may prevail as to the rail portion of the barge-rail movement. The only effect of denying use of the record already made would be to delay the determination of those questions. And it is appropriate, we suggest, that the first of them—the lawfulness of the specific rate proposal made by the rails—should be determined in the I. & S. proceedings. There is nothing to prevent the Commission from exercising, as it is here asked to do, its powers under the other sections of the statute at the same time, and thus coming to some solution of the general problem presented, instead of choosing between two alternatives only—the present rates on the one hand, and, on the other, the proposed rail schedules, whose lawfulness the Supreme Court holds has not been determined, and whose unlawfulness we assert on grounds wholly different from the sole argument which the Supreme Court has held to be an invalid one.

The scope of exploration of the facts by the Commission under this application will be determined by the Commission. Our requests are:

(1) That the lawfulness of the proposed schedules under the Interstate Commerce Act as amended in 1940 (and especially under Section 1, 2, Section 3 at amended by the Transportation Act of 1940, and the new National Transportation Policy enacted by the Transportation Act of 1940) be investigated and determined upon the record made and such further record as the Commission and the parties in interest may desire that
80

is addressed to the considerations raised by the Transportation Act of 1940 and the grounds of objection raised by this petitioner, and that upon such investigation the proposed schedules be condemned not merely on the ground that the rail service for the on-haul from the rate-break points is the same, but on the grounds that

(a) The proposed schedules violate Section 3 (4) of the Interstate Commerce Act as amended by the Transportation Act of 1940; and especially (not exclusively) in that they constitute a proposed discrimination against the traffic of this petitioner, a connecting common carrier of grain with respondents, in the rates and charges of respondents, inasmuch as the grain traffic of petitioner to the rate-break points would be gravely injured and crippled, to the detriment of the barge lines and the shipping public, all without any corresponding advantage to the respondents who propose the new schedules; and in that the proposed differentiation in the rail rate for the on-haul of ex-barge and ex-rail grain, to the disadvantage of ex-barge grain, is a discrimination, inasmuch as that differentiation is proposed notwithstanding the same kind of grain is involved, from the same origin west of Chicago, to the same eastern destination.

(b) The proposed schedules would violate the new National Transportation Policy enacted by the Transportation Act of 1940; and especially (not exclusively) in that by imposing a net increase in the cost of moving grain from country origin to destinations east of Chicago by barge-rail by the medium of imposing a higher rail rate for the on-haul wherever there is low water barge rate for the in-haul, they *pro tanto* destroy the inherent low cost advantage of water transportation, and constitute a de-
81 structive practice, without justification in any other consideration indicated by the law as stated in the new National Transportation Policy.

(c) The proposed schedules are violative of Section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1940; and especially (not exclusively) in that they would result in great decrease of barge-rail grain movement through the rate-break points, and substantially stop that movement, especially to Trunk Line and New England destinations.

(d) The proposed schedules are violative of Section 2 of the Interstate Commerce Act as amended by the Transportation Act of 1940; and especially (not exclusively) in that the proposed differentiation in the rail rate for the on-haul of ex-barge and ex-rail grain, to the disadvantage of ex-barge grain, is not just under any test of Section 2 as amended, inasmuch as the same kind of grain, from the same origin, would take the higher or lower rate for the same on-haul service to the same destination, on the sole

test of whether it came to the rate-break point by rail, or lake steamer, on the one hand, or by barge via the Illinois Waterways, on the other hand.

(2) That the Commission will in the same proceeding investigate and hear evidence and exercise its powers and especially (not exclusively) under the new National Transportation Policy and Sections 1, 2, 3, and 6 of the Interstate Commerce Act as amended in 1940, to determine the rates that may lawfully prevail for the rail on-haul of grain coming to the rate-break points involved by barge, and the relation between such rates and the rates for the rail on-haul service from the rate-break points of grain coming to the rate-break points involved by rail, and having both the same shipping or reshipping point west of Chicago, and the same destination east of Chicago.

Petitioner submits that the present rail rate proposal is unlawful; and that any other proposal made in advance of
82 the hearing of evidence as herein prayed would be an empty gesture, and is not required by the law or the rules or practice of this Commission as a condition of the relief here asked.

Summarizing the character of evidence to be presented, petitioner offers to show

(1) That the proposed schedules would differentiate in respect of the rate for the rail on-haul from the rate-break points involved between ex-barge grain on the one hand and ex-rail grain and ex-lake grain on the other, even though the origin of the grain is the same, the destination is the same, and the rail service is the same—and without a rational relation to any consideration whatever other than the sole consideration that ex-barge grain comes by barge, and ex-rail and ex-lake grain comes by other and favored modes of transportation to the transit point, and without regard or rational relation to any purpose other than the unlawful purpose to destroy the inherent low-cost advantage of water transportation in the movement of grain to the rate-break point in question.

(2) That transit of ex-barge grain can be policed.

(3) That the barge-rail movement would be, with negligible exceptions, stopped by the proposed rail schedules,

(a) To New England and Trunk Line Territory;

(b) To Central Territory east of the line where barge-rail combinations cease to be lower than or equal to all-rail charges;

(c) To all Central Territory destinations.

(4) That with negligible exceptions under the presently established schedules barge-rail grain is not shipped to Central Territory except such as has been sold on a delivered eastern basis.

(5) The extent of the exceptions, if any, to the foregoing.

83 (6) The proportions of barge-rail grain moving to Eastern territory under the present schedules.

(7) That ex-barge grain, with negligible exceptions, will disappear from the Chicago market insofar as it must find rail outlets, under any system of rail rates for the move east that is designed to put the ex-barge grain at a rate disadvantage compared with ex-rail grain.

(8) The extent to which ex-barge grain is dependent on escape by rail.

(9) That the only escape east for ex-barge grain is rail or lake steamer; and the inadequacy of the escape by lake steamer, especially under war conditions.

(10) The extent to which the economic cost of the grain movement through Chicago would be increased by any increase of rail rate for the on-haul of ex-barge grain, and that this increase would be reflected in a loss to farm producers of grain.

(11) That the advantage of any such differentiation of ex-barge and ex-rail grain to the disadvantage of the shipping public in respect of the rail rate for the on-haul

Would not benefit the eastern lines;

Would benefit the western lines only insofar as they transferred or built facilities to move into Chicago grain that now comes there by barge;

And that the western lines do not now have such facilities in that trade;

That it would hamper the war effort if western lines were to transfer or build such facilities, and it is doubtful if they would be permitted to transfer or build them;

That the consequence would be that grain now coming to Chicago for direct movement east would either cease to be produced or go downstream (insofar as it was not uneconomically fed on the farm) to find ultimate escape only by using salt water shipping

space urgently needed for other purposes of the war effort;

84 Would sacrifice the economic advantage of cheap water transportation with no off-setting advantage to anyone.

(12) That the war has placed heavy burdens on rail transport, including the western lines bringing grain to Chicago, and that it is not in the interest of the national defense to eliminate or cripple barge transportation in this important trade in vital foodstuffs.

Wherefore, petitioner prays for relief as hereinbefore requested.

85 BRIEF IN SUPPORT OF PETITION FOR REHEARING.

It is anomalous and unfortunate to terminate any I. and S. proceeding without determining the lawfulness of the rate proposal involved. It would be equally unfortunate in the circumstances

to fail to take advantage of the right to exercise all the Commission's powers: the interest of the rail and water carriers involved, of the shippers, and the national defense, are not served by leaving the questions presented to wander indefinitely in a procedural maze, but are served by determination of these questions as speedily as is consistent with full hearing and consideration.

Respectfully submitted.

EDWARD B. HAYES,

Attorney for A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line.

JUNE 22, 1943.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceding, by mailing by first-class mail a copy thereof properly addressed to each such party.

Dated at Chicago, Illinois, this 22nd day of June 1943.

EDWARD B. HAYES.

86 *Exhibit C to complaint*

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 13th day of July, A. D. 1943

I. & S. No. 4718

GRAIN PROPORTIONALS, EX-BARGE TO OFFICIAL TERRITORY

It appearing, That in the report of the Commission on reconsideration in the above-entitled proceeding, 248 I. C. C. 307, the Commission said that "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations."

It further appearing, That motions requesting leave to file petitions for rehearing and for an order fixing specific reshipping rates on ex-barge grain, together with such petitions, have been filed by Cargill, Incorporated; Continental Grain Company, Norris Grain Company; Rosenbaum Brothers; Santa Fe Elevator Corporation; and A. L. Mechling, doing business as A. L. Mechling Barge Line; and that said petitioners request rehearing for the purpose of presenting evidence which will permit the Commission to prescribe and fix reshipping rates on ex-barge grain predicated on the particular circumstances and conditions which surround its transportation;

It further appearing, That the said petitions in effect are complaints which bring in issue the lawfulness of rates applicable on

the through movement of the traffic considered in the instant
87 proceeding; and that the record therein may be of assistance in determination of the issues presented by said petitions.

And it further appearing, That the said petitions and replies thereto have been considered in the light of the record herein and the opinion of the Supreme Court of the United States in Interstate Commerce Commission, et al. v. Inland Waterways Corporation, et al., decided June 14, 1943.

It is ordered, That this proceeding be, and it is hereby, reopened for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by railroad of ex-barge grain, in carloads, from Chicago, Ill., and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic, and (2) to determine what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by said A. L. Mechling, doing business as A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed.

And it is further ordered, That this proceeding be, and it is hereby, assigned for further hearing on August 16, 1943, at 9:30 o'clock, a. m., at the Hotel Morrison, Chicago, Ill., before Examiner Fuller.

By the Commission:

[SEAL] W. P. BARTEL, *Secretary.*

89 In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action File No. 45-C-866—Judge Labuy

INLAND WATERWAYS CORPORATION, PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Complaint

Filed June 1, 1945

(Equitable Relief Sought)

90. 1. The plaintiff, Inland Waterways Corporation, brings this complaint against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside, and annulling a certain order, more

particularly hereinafter described, issued by the Interstate Commerce Commission (hereinafter referred to as the Commission) on February 13, 1945, in a proceeding before the Commission known as Investigation & Suspension Docket No. 4718, Grain Proportionals, Ex-Barge to Official Territory, said order being reproduced as Appendix A hereto. This action arises under, the United States is made a defendant herein, and the
91 jurisdiction of this Court is conferred by, U. S. C., Title 28, Sections 41 (28), 43, 44, 45, 45 (a), 46, 47, and 48, as hereinafter more fully appears.

2. Plaintiff, Inland Waterways Corporation, is a corporation organized and existing under the laws of the United States, with its principal office and place of business at St. Louis, Missouri; it is engaged in the operation of a common carrier barge line system of transportation on the Mississippi River and certain of its tributaries, including a common carrier barge line service in interstate commerce via water from Kansas City, Missouri-Kansas, on the Missouri River, from St. Louis, Missouri, East St. Louis, Illinois, and various other ports in Illinois, Iowa, and Minnesota on the Mississippi River, and from various ports in Illinois on the Illinois River via Illinois Waterways, to Chicago, Illinois; and is a common carrier by water subject to Part III of the Interstate Commerce Act (U. S. C., Title 49, Sections 901–923).

3. In the course of its business, plaintiff holds itself out to transport and does transport to Chicago, Illinois, grain in interstate commerce via barge over various waterways, including the Illinois Waterways, from the various ports refererred to in paragraph 2 above (said grain being hereinafter referred to as ex-barge grain), from whence said grain is available for reshipment both via lake steamer and via the lines of the railroad common carriers to destinations to the east of Chicago. In recent years the preponderance of the grain transported to Chicago by the plaintiff has originated at elevators in the Kansas City, Missouri-Kansas, switching district, said grain having been shipped into said elevators via railroad from origins to the west thereof.

Prior to September 18, 1940, said transportation by plain-
92 tiff via barge was not subject to the Interstate Commerce Act, but on the date last mentioned said transportation became subject to Part III of the Interstate Commerce Act by virtue of the amendments to that Act added by the Transportation Act of 1940, enacted September 18, 1940 (U. S. C., Title 49, Sections 901–923). Since March 1, 1941, said transportation has been conducted on rates and charges published and filed with the Interstate Commerce Commission pursuant to the requirements of the statutes just mentioned. In performing such transportation services, the plaintiff is in competition with numerous

common carriers by railroad-operating lines from the same origins to Chicago (said railroads being hereinafter referred to as Western Lines), and the plaintiff and said Western Lines are connecting carriers at Chicago of various common carriers by railroad-operating lines from Chicago, Illinois, to interstate destinations to the east thereof. Plaintiff's ability to compete with said Western Lines in the movement of grain to Chicago is directly affected by the relation of the rates assessed upon the reshipment of its grain from Chicago to the rates assessed upon the reshipment of the grain brought to Chicago by said Western Lines.

4. For many years the rail carriers operating lines from Chicago to interstate destinations to the east thereof (hereinafter referred to as Eastern Lines), have maintained in tariffs, lawfully published and filed with the Commission, separately stated proportional or reshipping rates from Chicago, Illinois, to destinations located throughout the various states to the east thereof, which are (1) the same on ex-barge grain as on ex-lake grain (grain shipped to Chicago via lake and stored thereat in elevators, awaiting reshipment to the East via the rails of the Eastern Lines, pursuant to transit rules and regulations maintained by
93 said Eastern Lines) from all origins except that ex-barge grain from Kansas City to destinations in central freight association territory (Indiana, Michigan, Ohio, western New York, western Pennsylvania, and western West Virginia) is provided with separately stated proportional or reshipping rates which, generally speaking, are three cents less than those provided on ex-lake grain, and (2) the same on ex-barge grain as on ex-rail grain (grain reshipped to Chicago via rail and stored thereat in elevators, awaiting reshipment to the East via the rails of the Eastern Lines, pursuant to transit rules and regulations maintained by said Eastern Lines) from the same origin, except that ex-barge grain from Illinois origins is provided with the same separately stated proportional or reshipping rates as are applied on ex-rail grain from origins in a territory defined by the tariff as Northwest, all of said proportional and reshipping rates being lower than the corresponding rates published for application on grain shipped from Chicago as though independent of, and without reference to, any prior in-bound movement and known as "local" grain. By tariffs filed to become effective October 15, 1939 (Supplement No. 23 to Agent B. T. Jones' I. C. C. No. 3047, Supplement No. 67 to Agent B. T. Jones' I. C. C. No. 3055, Supplement No. 7 to Agent B. T. Jones' I. C. C. No. 3300, and Supplement No. 7 to Agent B. T. Jones' I. C. C. No. 3372), the Eastern Lines proposed (a) to restrict the application of the said reshipping and proportional rates so as to make them inapplicable to ex-barge grain received over the Illinois waterways when reshipped from

Chicago; and (b) to subject said ex-barge grain to the higher basis of the higher local rates from Chicago referred to in this paragraph. The plaintiff, on September 1, 1939, filed with
94 the Commission its written protest against the change in rates proposed in the tariff schedules above noted, urging that such change in rates, if made effective, would be in violation of Sections 1 and 3 of the Interstate Commerce Act (U. S. C., Title 49, Sections 1 and 3), and on October 4, 1941, filed its supplemental written protest, requesting that the Commission suspend the operation of said schedules and enter into an investigation concerning the lawfulness thereof, pursuant to the authority conferred upon the Commission by paragraph (7) of Section 15 of the Interstate Commerce Act (U. S. C., Title 49, Section 15 (7)).

5. Thereupon, the Commission, by order of October 14, 1939, suspended the operation of said proposed change in rates and instituted an investigation into the lawfulness thereof in Investigation & Suspension Docket No. 4718, above mentioned, and the Eastern Lines, by appropriate supplements to their tariffs, deferred the effective date of the above described proposed change in rates on ex-barge traffic, and said change in rates and charges has not yet been made effective. Hearings were duly had in the proceeding instituted by that order and the parties were heard on brief, on exceptions to a report proposed by an Examiner of the Commission, and in oral argument.

6. On July 31, 1941, Division 2 of the Interstate Commerce Commission entered its report and order in said proceedings as shown in 246 I. C. C. 353, which report and order is made a part hereof by reference; in that report and order the said Division 2 found that the tariff schedules under suspension had not been shown to be unlawful. Accordingly, Division 2 vacated and set aside the suspension order and discontinued the proceeding as of August 30, 1941.

7. On August 22, 1941, the Commission modified its order
95 of July 31, 1941, so as to become effective on October 15, 1941, instead of August 30, 1941, and on September 30, 1941, the Commission further modified its order of July 31, 1941, as modified by the order of August 22, 1941, so as to postpone the effective date thereof until the further order of the Commission.

8. On December 4, 1941, the Commission issued its report and order on reconsideration in said proceeding as shown in 248 I. C. C. 307, which report and order is made a part hereof by reference. In its said report the Commission found that the proposed schedules had been shown to be just and reasonable, had not been shown to be otherwise unlawful and by its order the Commission vacated and set aside its order of suspension as of December 22, 1941, and discontinued the proceeding.

9. On December 15, 1941, plaintiff filed its complaint against the United States of America, et al., defendants, Civil Action No. 3725, in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enjoin and set aside the operation and effect of the Commission's order of December 1, 1941, above referred to. The Secretary of Agriculture filed a petition of intervention on February 6, 1942. A petition of intervention also was filed by A. L. Mechling, doing business as A. L. Mechling Barge Lines. A like complaint against the same defendants was filed in the same court by Cargill, Inc., et al., seeking the same relief, i. e., a decree enjoining and setting aside the order of December 1, 1941, and was docketed as Civil Action No. 3714. On February 6, 1942, the two cases, Civil Action Nos. 3725 and 3714, were consolidated, and on April 16, 1942, the District Court of the United States entered its final decree perpetually enjoining and setting aside the order of the Commission of December 1, 1941.

96 10. On appeal to the Supreme Court of the United States that court reversed the decree of the District Court of the United States and held that the Commission had acted within the power delegated to it by law. Interstate Commerce Commission v. Inland Waterways Corporation, 319 U. S. 671, decided June 14, 1943.

11. On July 13, 1943, the Commission entered the following order:

"Grain Proportionals, Ex-Barge to Official Territory

"It appearing, That in the report of the Commission on reconsideration in the above-entitled proceeding, 248 I. C. C. 307, the Commission said that 'in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.'

"It further appearing, That motions requesting leave to file petitions for rehearing and for an order fixing specific reshipping rates on ex-barge grain, together with such petitions, have been filed by Cargill, Incorporated; Continental Grain Company; Norris Grain Company; Rosenbaum Brothers; Santa Fe Elevator Corporation; and A. L. Mechling, doing business as A. L. Mechling Barge Line; and that said petitioners request rehearing for the purpose of presenting evidence which will permit the Commission to prescribe and fix reshipping rates on ex-barge grain predicated on the particular circumstances and conditions which surround its transportation;

"It further appearing, That the said petitions in effect are complaints which bring in issue the lawfulness of rates applicable on the through movement of the traffic considered in the instant pro-

ceeding; and that the record therein may be of assistance in determination of the issues presented by said petitions.

"And it further appearing, That the said petitions and replies thereto have been considered in the light of the record herein
97 and the opinion of the Supreme Court of the United States in Interstate Commerce Commission, et al., v. Inland Waterways Corporation, et al., decided June 14, 1943.

"It is ordered, That this proceeding be, and it is hereby, reopened for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by railroad of ex-barge grain, in carloads, from Chicago, Ill., and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic; and (2) to determine what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by said A. L. Mechling, doing business as A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed.

"And it is further ordered, That this proceeding be, and it is hereby assigned for further hearing on August 16, 1943, at 9:30 o'clock a. m., at the Hotel Morrison, Chicago, Ill., before Examiner Fuller."

Meantime, the Eastern Lines voluntarily postponed the effective date of the proposed schedules pending the outcome of the further hearing. Further hearing was had and on February 13, 1945, the Commission entered its report and order on further hearing, containing its findings of fact and conclusions thereon.

The report of the Commission found that the rates under suspension proposed on the local rail rate basis were unlawful, among other reasons, because in violation of Section 3 (4) of the Interstate Commerce Act; accordingly, the suspended schedules were ordered to be cancelled on or before April 5, 1945.

The Commission found, as an ultimate conclusion, that
98 reshipping or proportional rates for transportation of ex-barge grain, in carloads, from Chicago, Illinois, to eastern destinations will be reasonable and lawful under Sections 1, 2, 3 (1), 3 (4), 6 (11) (b), and 15a (2) of the Interstate Commerce Act (U. S. C., Title 49, Sections 1, 2, 3 (1), 3 (4), 6 (11) (b), and 15a (2), if made certain differentials under the local rail rates contemporaneously in effect, said differentials being as follows:

When local rail rate on grain is (cents):

13-14.

15-22.

23–24.
25–26.
27–28.
28.5 and over.

Differential, ex-barge under local rail rate, shall be (cents):
1.
2.
3.
4.
5.
5.5.

The result of the foregoing method of determining the rate to be applied on ex-barge grain east of Chicago is that the prescribed rates on ex-barge grain east of Chicago are higher than the proportional rates on ex-rail grain from the same origins and higher that the proportional rates on ex-lake grain from all origins by varying amounts ranging up to 3 cents per hundred pounds. A copy of the report and order of the Commission is attached hereto as Appendix A to this complaint.

On March 26, 1945, the Commission modified its order of February 13, 1945, so that the same will become effective on June 5, 1945, upon one day's notice instead of on April 5, 1945.

12. If said order of February 13, 1945, is permitted to
99 become effective, and the Eastern Lines make the change in rates and charges found lawful and authorized thereby, the plaintiff will be unable to compete with Western Lines for the transportation of grain transported to Chicago for the purpose of reshipment therefrom by rail. The value of ex-barge grain at Chicago is precisely the same as the value at Chicago of ex-lake or ex-rail grain of the same species and grades. Under the relationship in rates and charges prescribed by the Commission in its report, the rate on ex-barge grain from Chicago to New York City, as a representative destination, if shipped, would be 3 cents per hundred pounds higher than the rate from Chicago to New York City on ex-lake or ex-rail grain.

No shipper will use the line of the plaintiff for its inbound transportation to Chicago of grain to be shipped via rail to eastern destinations in the face of the rate penalty of 3 cents per hundred pounds just noted.

On grain stored at Kansas City, subsequent to a rail movement thereto and reshipped from elevators in the Kansas City switching district to Chicago, the proportional rate maintained by Western Lines from Kansas City to Chicago is 16 cents; and the plaintiff's rated by barge is 9.5 cents or 6.5 cents less than the rail

rate. On shipments by plaintiff's barge, the shipper must pay in addition to the 9.5 cents rate per hundred pounds the cost of trimming the grain during unloading and the service of weighing and inspection incident to the transfer of the grain from barges to cars at point of interchange, which aggregate 3.25 cents. The 6.5 cents saving in rate is thus reduced to 3.25 cents per hundred pounds and this saving would accrue only in respect to grain shipped out of a Kansas City elevator located on the river bank so as to involve no charge for switching from the elevator to the barge and no charge for loading into the barge.

100 In case of grain stored in an elevator away from the river bank and reshipped therefrom, a further expense not included in the barge rate is the charge of 39 cents per ton for transfer of grain from car to barge and a switching charge of $6.93, or $8.91 per car when loaded at and moved from a rail elevator to the river bank at Kansas City; the minimum extra expense on such grain is thus 2.64 cents per hundred when loaded from an elevator in cars of 100,000 pounds. Thus, all of the saving between rail proportional rate of 16 cents to Chicago and barge rate of 9.5 cents—6.5 cents—except .36 cents is absorbed in getting ex-barge grain at Chicago ready for rail haul east of Chicago. Under the prescribed 3-cent higher rail rate on ex-barge grain for the haul east of Chicago, the total cost to the shipper would be 2.64 cents per hundred pounds higher than if he were to route the shipment all-rail from Kansas City to New York City.

Under such circumstances plaintiff verily believes and therefore avers that shippers will use the lines of rail carriers with which plaintiff competes for the haul to Chicago and will not use the barge line of the plaintiff, since thereby reshipment via rail from Chicago to eastern destinations can be obtained at a freight rate 3 cents lower than if the grain so reshipped were brought into Chicago by the plaintiff.

By reason of the circumstances just described, plaintiff verily believes and therefore avers that it will be unable to secure traffic which it would otherwise secure, and will be subjected to irreparable damage and injury if the Eastern Lines make effective the change in rates and charges found lawful and authorized in the report and order of the Commission of February 13, 1945.

101 13. The report and order of the Commission of February 13, 1945, is unlawful and void and beyond the power of the Commission to make for the following reasons:—

(a) Said report and order is not supported by essential findings of fact to show that the circumstances and conditions surrounding barge-rail transportation from Kansas City to New York, as representative of eastern territory, or the transportation by rail of ex-barge grain from Chicago to New York, are different from

those surrounding lake-rail transportation from Duluth via Chicago to New York, or the transportation by rail of ex-lake grain from Chicago to New York, so as to justify a proportional or reshipping rate on the ex-barge traffic 3 cents per hundred pounds higher than on the ex-lake traffic.

(b) The report and order authorizing the reshipping or proportional rate from Chicago to New York, as representative of eastern territory, on ex-barge grain from Kansas City higher than on ex-lake grain from Duluth rests on an erroneous construction of Section 3 (4) of the Act and was beyond the power of the Commission to enter.

(c) Said report and order is not supported by essential findings of fact to show that circumstances and conditions surrounding barge-rail transportation from Kansas City to New York, as representative of eastern territory, or the transportation by rail of ex-barge grain from Chicago to New York, are different from those surrounding all-rail transportation from Kansas City via Chicago to New York, or the transportation by rail of ex-rail grain from Chicago to New York, so as to justify a proportional or reshipping rate on the ex-barge traffic 3 cents per hundred pounds higher than on ex-rail traffic from the same origin.

102 (d) The Commission misconstrued and exceeded its power under Section 3 (4) of the Act in authorizing a higher proportional or reshipping rate from Chicago to New York on ex-barge grain from Kansas City than is contemporaneously provided on ex-rail grain from Kansas City, said disparity purporting to be based on differences in the average circumstances and conditions surrounding all-rail grain, on the one hand, as compared with all barge-rail grain, on the other. The duty of the Commission in the premises was to fix the relation between said ex-barge and ex-rail rates in the light of the conditions surrounding the particular traffic for which plaintiff is in competition with Western Lines, viz, grain shipped from Kansas City and transported to eastern destinations via Chicago with a transit stop at the latter point.

(e) The Commission misconstrued and exceeded its power under Section 3 (4) of the Act in finding that a non-discriminatory reshipping or proportional rate on ex-barge grain, originated by plaintiff at Kansas City, could be determined by computing the average difference between the railroad local rates from barge origins to Chicago, on the one hand, and the through w. t. l. scale from said origins to eastern destinations, on the other hand.

(f) Said report and order contain no finding that the prescribed rate basis or relationship would permit grain to move via barge-rail routes from Kansas City to the east via Chicago.

(g) The Commission was without power to make the order complained of for the reason that it is apparent from the face of the report that the prescribed rates east of Chicago, applicable on plaintiff's grain transported by it in its barges from Kansas City to Chicago would destroy the inherent advantage of barge
103 transportation in connection with barge-rail routes to official territory in contravention of the national transportation policy and without regard to the rate-making factor stated in Section 15a (2) of the Interstate Commerce Act.

(h) There is no evidence of record upon which the Commission could find:

When local rail rate on grain is (cents):

13–14.
15–22.
23–24.
25–26.
27–28.
28.5 and over.

Differential, ex-barge under local rail rate, shall be (cents):

1.
2.
3.
4.
5.
5.5.

and therefore the said order of February 13, 1945, is void.

(i) The Commission was without authority in law or in fact to make said order of February 13, 1945.

Wherefore, plaintiff prays:

That a preliminary injunction be entered enjoining and setting aside the operation and effect of the said order of February 13, 1945, until final determination of this cause, and that upon final hearing herein, a decree be entered perpetually enjoining and setting aside the operation and effect of said order; and

That plaintiff have such other and further relief in the premises as the nature of the case shall require and to this Court shall seem proper.

JOHN S. BURCHMORE,
NUEL D. BELNAP,
LUTHER M. WALTER,
Attorneys for Plaintiff.

WALTER, BURCHMORE & BELNAP,
Of Counsel.
2106 Field Building, Chicago 3, Illinois.

JUNE 1, 1945.

163 In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action File No. 45-C-1620

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES AND THE WAR FOOD ADMINISTRATOR, PETITIONERS

v.

UNITED STATES OF AMERICA

Petition

Filed June 27, 1945

1. The Petitioners, the Secretary of Agriculture of the United States and the War Food Administrator, file this petition against the United States of America for the purpose of suspending, enjoining, setting aside, and annulling a portion, more particularly specified in the Prayer hereof, of a certain Order issued by the Interstate Commerce Commission (hereinafter called the "Commission") on February 13, 1945, incident to a proceeding before the Commission identified in its files as Investigation and Suspension Docket No. 4718, Grain Proportionals, Ex-Barge to Official Territory. Said Order appears as a mimeograph release of the Commission and has been reproduced with the Report of the Commission and made a part thereof as Exhibit "A" in the complaint filed on June 1, 1945, on behalf of A. L. Mechling Barge Line (Civil Action 45-C-865) and as Exhibit "A" in a complaint filed on June 1, 1945, on behalf of Inland Waterways Corporation (Civil Action 45-C-866), to which reference is hereby made.

164 2. This action arises under, the United States is made a defendant herein, and the jurisdiction of the Court is conferred by U. S. C. Title 28, Section 41 (28), 43, 44, 45, 45 (a), 46, 47, and 48, and U. S. C., Title 7, Section 1291, as hereinafter more fully appears.

3. The Secretary of Agriculture and the War Food Administrator are proper parties plaintiff in view of provisions of Section 204 of the Agricultural Adjustment Act of 1938 (52 Stat. 36; U. S. C., Title 7, Section 1291), which provides as follows:

"(a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges,

tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.

"(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the right of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs.

"(c) For the purposes of this section, the Interstate Commerce Commission is authorized to avail itself of the cooperation, records, services, and facilities of the Department of Agriculture";

and pursuant to Executive Order 9334 of April 19, 1943 (8 F. R. 5423), which order transferred the powers of the Secretary of Agriculture under Section 201, supra, for joint administration, to the War Food Administrator, and pursuant to Executive Order 9280 of December 5, 1942 (7 F. R. 10179), which order, inter alia, directed the War Food Administrator "to formulate and carry out a program designed to furnish a supply of food adequate to meet" military, civilian, and foreign requirements, "both for human and animal consumption and for industrial uses," and to "take all appropriate steps to insure the efficient and proper distribution of the available supply of food."

4. For many prior years grain farmers near the Illinois Waterway have shipped their products in large volume to Chicago by barge, for trans-shipment from Chicago to eastern points and foreign destinations. Many of these producers were and are members of cooperative associations of farmers who have extensive river bank elevator facilities to handle the barge traffic. Barge traffic in grain via the Illinois Waterway to Chicago developed and was and is coordinated with rail traffic outbound eastward from Chicago under certain provisions in the tariffs of eastern railroads, which stated reshipping and proportional rates on grain moving from Chicago to eastern destinations equal to rates published to transport grain arriving in Chicago by rail or by lake, which rates were lower to common destinations than rates published for application to local grain shipped from Chicago to the same destinations.

5. Barge rates from water lading points in the grain production territory involved in this proceeding to Chicago are considerably lower than rail rates from the same points. Accordingly, certain common carriers by rail, hereinafter referred to as the "western

railroads," move very little of the grain originating in barge territory to Chicago.

6. Taking this fact into account said eastern railroads by tariffs filed to become effective October 15, 1939 (Supplement No. 23 to Agent B. T. Jones' I. C. C. No. 3047, Supplement No. 67 to Agent B. T. Jones' I. C. C. 3055, Supplement No. 7 to Agent B. T. Jones' I. C. C. No. 3300, and Supplment No. 7 to Agent B.
166 T. Jones' I. C. C. No. 3372,) proposed (a) to restrict the application of said reshipping or proportional rates so as to make them inapplicable to ex-barge grain received from the Illinois Waterways when reshipped from Chicago, and (b) to subject said ex-barge grain to the higher basis of the local rates from Chicago to eastern destinations.

7. In September 1939, certain parties filed a written protest with the Commission against the proposed rates above noted, charging that such advantage in rates, if made effective, would be in violation of the Interstate Commerce Act as it then read. Supplemental protests requesting the Commission to suspend the operation of said schedules and enter into an investigation concerning the lawfulness thereof were also filed.

8. Thereupon, the Commission, by Order of October 14, 1939, suspended the operation of the tariffs in question and instituted an investigation docketed as Investigation and Suspension Docket No. 4718.

9. Hearings were duly held by the Commission with reference to Docket No. I. & S. 4718 in Chicago, commencing on December 19, 1939, and ending on January 26, 1940. The Secretary of Agriculture, by counsel, entered an appearance at that hearing, and thereby became a party to the proceeding. Briefs were filed, exceptions noted to the proposed report of the Examiner of the Commission, and the parties were heard in oral argument.

10. On July 31, 1941, Division 2 of the Commission published its report and order in the proceeding, as shown in 246 ICC 253, which report and order are made a part hereof by reference. In that report and order, Division 2 found that the tariff schedules under suspension had not been shown to be unlawful, vacated and set aside the suspension order and discontinued the proceedings as of August 30, 1941.

167 11. On August 22, 1941, the Commission modified its order of July 31, 1941, so as to become effective on October 15, 1941, instead of August 30, 1941; and on September 30, 1941, the Commission further modified its order of July 31, 1941, as modified by the order of August 22, 1941, so as to postpone the effective date thereof until the further order of the Commission.

12. The Commission, on December 1, 1941, issued its report and order on reconsideration in said proceeding, as shown in 248

I. C. C. 307, which report and order are made a part hereof by reference, In its said report, the Commission found that the proposed schedules had been shown to be just and reasonable, had not been shown t obe otherwise unlawful, and by its order the Commission vacated and set aside its order of suspension as of December 22, 1941, and discontinued the proceeding.

13. In December 1941 certain of the protesting parties filed complaints against the United States in this Court, seeking the injunction and setting aside of said order of the Commission. The complaints were docketed as Civil Action No. 3725 and Civil Action 3714, and consolidated for hearing. The Secretary of Agriculture and other parties intervened. On April 16, 1942, the Court entered its final decree perpetually enjoining and setting aside said order of the Commission.

14. On appeal to the Supreme Court of the United States, that Court held that the Commission had not approved said railroad rate proposed and reversed the decree of the District Court. Interstate Commerce Commission *v.* Inland Waterways Corporation, 319 U. S. 671.

15. Pursuant to the statement of the Commission in its report of December 1, 1941, that in a proper proceeding it could prescribe reshipping rates on this ex-barge grain traffic, which statement was noted by the said decision of the Supreme Court, on July 13, 1943, the Commission entered the following order:

168 "Grain Proportionals, Ex-Barge to Official Territory.

"It appearing, That in the report of the Commission on reconsideration in the above-entitled proceeding, 248 ICC 307, the Commission said that 'in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.'

"It further appearing, That motions requesting leave to file petitions for rehearing and for an order fixing specific reshipping rates on ex-barge grain together with such petitions, have been filed by Cargill, Incorporated; Continental Grain Company; Norris Grain Company; Rosenbaum Brothers; Santa Fe Elevator Corporation; and A. L. Mechling, doing business as A. L. Mechling Barge Line; and that said petitioners request rehearing for the purpose of presenting evidence which will permit the Commission to prescribe and fix reshipping rates on ex-barge grain predicated on the particular circumstances and conditions which surround its transportation;

"It further appearing, That the said petitions in effect are complaints which bring in issue the lawfulness of rates applicable on the through movement of the traffic considered in the instant proceeding; and that the record therein may be of assistance in determination of the issues presented by said petitions.

"And it further appearing, That the said petitions and replies thereto have been considered in the light of the record herein and the opinion of the Supreme Court of the United States in Interstate Commerce Commission, et al., v. Inland Waterways Corporation, et al., decided June 14, 1943.

"It is ordered, That this proceeding be, and it is hereby, reopened for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by railroad of ex-barge grain, in carloads, from Chicago, Illinois, and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic, and (2) to determine what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by said A. L. Mechling, doing business as A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed.

169 "And it is further ordered, That this proceeding be, and it is hereby assigned for further hearing on August 16, 1943, at 9:30 o'clock A. M., at the Hotel Morrison, Chicago, Illinois, before Examiner Fuller."

16. The eastern railroads postponed the effective date of the proposed tariffs pending the outcome of the further hearing, which was held as scheduled in the above quoted order. An Examiner's report was duly proposed, exceptions thereto were filed, and the case, based upon the total record, i. e., the record of the hearings in December 1939, January 1940, and August 1943, was argued before the entire Commission.

17. On February 13, 1945, the Commission entered its report and order on further hearing, in which the Commission found, inter alia, that the rates under suspension were unlawful and ordered them to be cancelled on or before April 5, 1945. The Commission found, however, as an ultimate conclusion, that the reshipping or proportional rates for transportation of ex-barge grain, in carloads, from Chicago, Illinois, to eastern destinations will be reasonable and lawful under Sections 1, 2, 3 (1), 3 (4), 6 (11) (b), 15 (a). (2) of the Interstate Commerce Act (U. S. C. Title 49, Sections 1, 2, 3 (1), 3 (4), 6 (11), 15 (a), and 15 (a) (2), if based upon certain differentials under the prevailing local rates, said differentials being as follows:

When local rail rate on grain is (cents):

13–14.	25–26.
15–22.	27–28.
23–24.	28.5 and over.

Differential, ex-barge under local rail rate, shall be (cents):

1.	4.
2.	5.
3.	5.5.

The rates thus prescribed by the Commission are higher than the reshipping or proportional rates now applying on ex-barge, ex-rail and ex-lake grain by varying amounts up to three cents per 100 pounds.

170 18. On March 26, 1945, the Commission modified its order of February 13, 1945, so that the same would become effective on June 5, 1945, instead of April 5, 1945.

19. All grain of like grade and kind comes to a common value at the Chicago marketing place and distribution center, regardless of the means of transportation by which it reaches Chicago, the length of the in-bound haul, or the rate paid for the in-bound movement, provided it can all (as at present) be reshipped to eastern territory on the same charges and transit (as at present) in central territory, for delivery in eastern territory, on a basis of equal rates from Chicago to eastern territory. If the said order of the Commission should become effective, grain shipped to Chicago by barge would be discounted on the Chicago market and the amount of that discount would ultimately be reflected in a lower price paid to the farm producers of grain. The rate differential authorized by the said order of the Commission offsets the advantage of low in-bound barge rates to Chicago by an increase in the established rail rates out of Chicago. Buyers of grain in Chicago get no advantage in any given transaction of the low barge rates into Chicago, but such buyers must reckon with any increased costs of shipping grain out of Chicago. This they do by passing the disadvantage of such increases in cost back to the shipper. He, in turn passes it on to the farm producers. The foregoing result would be accentuated by the diversion to the western railroads of barge-borne grain inasmuch as the rates and services of barge carriers and waterway elevator loading and marketing facilities are in adjustment to the volume of barge-borne grain.

171 20. The transportation characteristics of ex-barge grain and ex-lake grain are identical and should have parity of treatment with respect to reshipping rates and charges applicable to each out of Chicago, accordingly. Pursuant to the report and order of the Commission attached herein, grain which reaches Chicago via the Great Lakes is authorized to move to Eastern destinations on the same basis as ex-rail grain while this parity of treatment is denied to ex-barge grain.

21. Grain is an agricultural product adapted to barge transportation. It is a bulk-loading commodity such as sulphur, coal,

scrap iron, steel and petroleum. It is a fungible commodity so that the mixing of grain of like grade and kind has no effect upon its transportation or distribution. It can be transported in barge tows equivalent to 80 loaded freight cars of 90,000 pounds each.

22. Barge transportation of grain during the present wartime conditions has peculiar significance in view of the fact that the railroads do not have sufficient facilities to handle the traffic. Petitioners herein are charged with the responsibility of "taking all appropriate steps to insure the efficient and proper distribution of the available supply of food." Any measure adopted by the railroads, with the permission of the Commission, that will have the effect of immobilizing water transportation facilities thereby preventing or discouraging the shipment of agricultural products, to wit, grain, is inimical to the war effort. It also impairs of "the national defense," as defined in the National Transportation Policy (54 Stat. L. 899, U. S. C. Title 49, Section 1).

23. The order of the Commission of February 13, 1945, is unlawful for the following reasons among others:

172 (a) The report upon which the order is based does not contain essential findings of fact showing that the circumstances and conditions surrounding the movement of ex-barge grain are different from those surrounding the transportation of ex-lake or ex-rail grain from the same or from different origins into Chicago destined for trans-shipment to the same destinations east thereof which would warrant penalty rates outbound for said ex-barge grain under Sections 1 (4), 1 (5) (a), 1 (6), 2, 3 (1), and 3 (4) of the Interstate Commerce Act.

24. The Commission has violated the National Transportation Policy in failing to recognize and preserve the inherent advantages of water transportation of grain, and as a consequence has:

(a) Imperiled the welfare of the barge lines;

(b) Deprived grain producers and shippers of lower cost transportation;

(c) Weakened the ability of barge lines to contribute to the "national defense."

173 25. In prescribing rates for the movement of ex-barge grain in excess of those covering transportation of ex-lake and ex-rail grain to similar destinations, the Commission has failed to observe the rule of rate making stated in Section 15 (a) (2) of the Interstate Commerce Act.

26. There is no evidence of record upon which the Commission could find:

When local rail rate on grain is (cents):

13–14.

15–22.

23–24.
25–26.
27–28.
28.5 and over.

Differential, ex-barge under local rail rate, shall be (cents):

1.
2.
3.
4.
6.
5.5.

and, therefore, said order of February 13, 1945, is void.

Wherefore, Petitioners pray:

That a preliminary injunction be entered enjoining and setting aside the operation and effect of that part of said order of the Commission of February 13, 1945, which authorizes the imposition of reshipping rates on ex-barge grain based on the schedule in Paragraph 26 hereof and to sustain that portion of the Commission's Order which requires cancellation of the schedules proposed by said eastern railroads, until final determination of this cause, and that upon final hearing herein, a decree be entered perpetually enjoining and setting aside the operation and effect of said order in the foregoing particulars, and

174 That Petitioners have such other and further relief in the premises as the nature of the case shall require and as this Court shall deem proper.

This 27 day of June 1945.

ROBERT H. SHIELDS,
Solicitor, United States,
Department of Agriculture.
CHARLES B. NUTTING,
Associate Solicitor,
United States Department of Agriculture.
By James K. Knudson,
JAMES K. KNUDSON,
Principal Attorney, United States Department of Agriculture, Room 1328, South Bldg., Washington, D. C.,
Attorneys for Petitioners.

James A. Doyle,
JAMES A. DOYLE,
Regional Attorney,
United States Department of Agriculture,
208 South LaSalle Street, Chicago 4, Illinois.

176 In the District Court of the United States
Civil Action File No. 45–C–865

[Title omitted]

Intervention of Interstate Commerce Commission

Filed Aug. 2, 1945

Now comes the Interstate Commerce Commission, pursuant to the provisions of Section 212 of the Judicial Code, 36 Stat. 1150 (U. S. C. Supp. VI, Title 28, Sec. 45a), and hereby intervenes as party defendant in the above-entitled cause, and enters the appearance of the undersigned as its counsel.

DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.

177 In the District Court of the United States
Civil Action File No. 45–C–865

[Title omitted]

Answer of the Interstate Commerce Commission

Filed Aug. 2, 1945

Now comes the Interstate Commerce Commission, intervening defendant herein, by its counsel, and in answer to the allegations of the complaint respectfully represents:

1. The Commission admits the jurisdiction of this Court over the parties and subject matter of this suit.

2. The Commission admits the procedural facts set forth in the complaint.

3. The Commission denies each and every allegation of error set forth in the complaint.

4. In further answer, the Commission avers that in the proceeding referred to in said complaint the plaintiff herein as well as other parties of record were accorded a full and fair hearing as set out by the Interstate Commerce Act; that in said hearing a large amount of testimony and other evidence bearing upon the issues involved were submitted to the Commission for consideration; that in said proceeding questions relating to said issues
178 were submitted to the Commission for determination, including questions raised by the plaintiff in this cause, whereupon the Commission determined said issues and entered and served upon the parties to said proceeding its report and order complained of herein; that said report and order contains the Commission's findings of fact and conclusions thereon upon the evidence aforesaid.

The Commission further alleges that each and all findings and conclusions in said report were and are supported by substantial evidence.

The Commission further alleges that in making said report of February 13, 1945, it considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention by all the parties to the proceeding included questions and matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of February 13, 1945, was not made or entered either arbitrarily or capriciously or contrary to the relevant evidence or without evidence to support them; that in making said report and order the Commission did not exceed the authority duly conferred upon it, and the commission denies each and every allegation to the contrary contained in the complaint herein.

Except as herein expressly admitted, the Commission denies the truth of each and every allegation contained in the complaint in so far as they conflict with the allegations herein or with statements or conclusions contained in said report and order of February 13, 1945, to which reference is hereby made.

Wherefore, The Commission prays that the complaint
179 be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of counsel.

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the within Intervention and Answer of the Interstate Commerce Commission by mailing the same to each of the counsel of record in this cause as follows: Edward B. Hayes, Esq., 2400 Field Building, Chicago, Ill. Edward Dumbauld, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

July 31, 1945.

DANIEL H. KUNKEL, *Attorney.*

181 In the District Court of the United States

Civil Action File No. 45–C–866

[Title omitted.]

Answer of the Interstate Commerce Commission.

Filed Aug. 2, 1945

Now comes the Interstate Commerce Commission, one of the defendants herein, by its counsel, and in answer to the allegations of the complaint respectfully represents:

1. The Commission admits the jurisdiction of this Court over the parties and subject matter of this suit.

2. The Commission admits the procedural facts set forth in the complaint.

3. The Commission denies each and every allegation of error set forth in the complaint.

4. In further answer, the Commission avers that in the proceeding referred to in said complaint the plaintiff herein as well as other parties of record were accorded a full and fair hearing as set out by the Interstate Commerce Act; that in said hearing a large amount of testimony and other evidence bearing upon the issues involved were submitted to the Commission for consideration; that in said proceeding questions relating to said

182 issues were submitted to the Commission for determination, including questions raised by the plaintiff in this cause; whereupon the Commission determined said issues and entered and served upon the parties to said proceeding its report and order complained of herein; that said report and order contains the Commission's findings of fact and conclusions thereon upon the evidence aforesaid.

The Commission further alleges that each and all said findings and conclusions in said report were and are supported by substantial evidence.

The Commission further alleges that in making said report of February 13, 1945, it considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention by all of the parties to the proceeding including questions and matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of February 13, 1945, was not made or entered either arbitrarily or capriciously or contrary to the relevant evidence or without evidence to support them; that in making said report and order the

Commission did not exceed the authority duly conferred upon it, and the Commission denies each and every allegation to the contrary contained in the complaint herein.

Except as herein expressly admitted, the Commission denies the truth of each and every allegation contained in the complaint in so far as they conflict with the allegations herein or with statements or conclusions contained in said report and order of February 13, 1945, to which reference is hereby made.

Wherefore, the Commission prays that the complaint be
183 dismissed.

INTERSTATE COMMERCE COMMISSION,
By Daniel H. Kunkel,
DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the within Intervention and Answer of the Interstate Commerce Commission by mailing the same to each of the counsel of record in this cause as following: Walter, Burchmore & Belnap, Luther M. Walter, Esq., 2106 Field Building, Chicago 3, Ill. Edward Dumbauld, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

July 31, 1945.

Daniel H. Kunkel,
DANIEL H. KUNKEL, *Attorney.*

185 In the District Court of the United States

Civil Action File No. 45–C–1020

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Aug. 2, 1945

Now comes the Interstate Commerce Commission, pursuant to the provisions of Section 212 of the Judicial Code, 36 Stat. 1150 (U. S. C. Supp. VI, Title 28, Sec. 45a), and hereby intervenes as

party defendant in the above-entitled cause, and enters the appearance of the undersigned as its counsel.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.

186 In the District Court of the United States

Civil Action File No. 45–C–1020

[Title omitted.]

Answer of the Interstate Commerce Commission

Filed Aug. 2, 1945

Now comes the Interstate Commerce Commission, intervening defendant herein, by its counsel, and in answer to the allegations of the complaint respectfully represents:

1. The Commission admits the jurisdiction of this Court over the parties and subject matter of this suit.

2. The Commission admits the procedural facts set forth in the complaint.

3. The Commission denies each and every allegation of error set forth in the complaint.

4. In further answer, the Commission avers that in the proceeding referred to in said complaint the plaintiffs herein as well as other parties of record were accorded a full and fair hearing as set out by the Interstate Commerce Act; that in said hearing a large amount of testimony and other evidence bearing upon the issues involved were submitted to the Commission for consideration; that in said proceeding questions relating to said issues
187 were submitted to the Commission for determination, including questions raised by the plaintiffs in this cause, whereupon the Commission determined said issues and entered and served upon the parties to said proceeding its report and order complained of herein; that said report and order contains the Commission's findings of fact and conclusions thereon upon the evidence aforesaid.

The Commission further alleges that each and all said findings and conclusions in said report were and are supported by substantial evidence.

The Commission further alleges that in making said report of February 13, 1945, it considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention by all of the parties to the proceeding including questions and matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of February 13, 1945, was not made or entered either arbitrarily or capriciously or contrary to the relevant evidence or without evidence to support them; that in making said report and order the Commission did not exceed the authority duly conferred upon it, and the Commission denies each and every allegation to the contrary contained in the complaint herein.

Except as herein expressly admitted, the Commission denies the truth of each and every allegation contained in the complaint in so far as they conflict with the allegations herein or with statements or conclusions contained in said report and order of February 13, 1945, to which reference is hereby made.

Wherefore, The Commission prays that the complaint
188 be dismissed.

INTERSTATE COMMERCE COMMISSION,
Daniel H. Kunkel,
By DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the within Intervention and Answer of the Interstate Commerce Commission by mailing the same to each of the counsel of record in this cause as follows: Robert H. Shields, Esq., and James K. Knudson, Esq., United States Department of Agriculture, Washington, D. C. Edward Dumbauld, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

July 31, 1945.

Daniel H. Kunkel,
DANIEL H. KUNKEL, *Attorney.*

190 In the District Court of the United States

Civil Action No. 45–C–865

[Title omitted.]

Answer of the United States of America

Filed June 27, 1945

Now comes the United States of America, defendant in the above-styled action, and for answer to the complaint herein admits each and all of the allegations in the said complaint contained; and that the relief prayed for should be granted by this Court, and that the order of the Interstate Commerce Commission assailed in the said action (being the said Commission's order of February 13, 1945, in investigation and suspension docket No. 4718, including the report of the same date made a part thereof by reference), should be set aside, in so far as it undertakes to authorize the establishment of rates in conformity with the findings contained in the said report (but not in so far as it requires the cancellation of the rate schedules heretofore filed by the carriers, but the effective dates of which has been postponed).

Wherefore, this defendant prays that the relief prayed for by plaintiffs be granted by this Court, and that the aforesaid order of the Interstate Commerce Commission, as set forth above, be set aside as erroneous, arbitrary, unsupported by substantial evidence, and contrary to law.

191 Edward Dumbauld,
EDWARD DUMBAULD,
David O. Mathews,
DAVID O. MATHEWS,
Special Assistants to the Attorney General,
Department of Justice, Washington 25, D. C.

WENDELL BERGE,
Assistant Attorney General.
J. ALBERT WOLL,
United States Attorney.

I certify that copies of the foregoing answer were this day mailed to the following persons: Edward B. Hayes, Esq., 2400 Field Building, Chicago, Illinois. Daniel H. Kunkel, Esq., Interstate Commerce Commission, Washington 25, D. C.

This — day of June, 1945.

EDWARD DUMBAULD,
Special Assistant to the Attorney General.

198 In the District Court of the United States
Civil Action No. 45–C–866.

[Title omitted.]

Answer of the United States of America

Filed June 27, 1945

Now comes the United States of America, defendant in the above-styled action, and for answer to the complaint herein admits each and all of the allegations in the said complaint contained, and that the relief prayed for should be granted by this Court, and that the order of the Interstate Commerce Commission assailed in the said action (being the said Commission's order of February 13, 1945, in investigation and suspension docket No. 4718, including the report of the same date made a part thereof by reference), should be set aside, in so far as it undertakes to authorize the establishment of rates in conformity with the findings contained in the said report (but not in so far as it requires the cancellation of the rate schedules heretofore filed by the carriers, but the effective date of which has been postponed).

Wherefore, this defendant prays that the relief prayed for by plaintiffs be granted by this Court, and that the aforesaid order of the Interstate Commerce Commission, as set forth above, be set aside as erroneous, arbitrary, unsupported by substantial evidence, and contrary to law.

194 Edward Dumbauld,
EDWARD DUMBAULD,
David O. Mathews,
DAVID O. MATHEWS,
Special Assistants to the Attorney General,
Department of Justice, Washington 25, D. C.

Wendell Berge,
WENDELL BERGE,
Assistant Attorney General.
J. Albert Woll,
J. ALBERT WOLL,
United States Attorney.

I certify that copies of the foregoing answer were this day mailed to the following persons: John S. Burchmore, Esq., Nuel D. Belnap, Esq., Luther M. Walter, Esq., 2106 Field Building, Chicago 3, Illinois. Daniel H. Kunkel, Esq., Interstate Commerce Commission, Washington 25, D. C.

This 22d day of June 1945.

Edward Dumbauld,
EDWARD DUMBAULD,
Special Assistant to the Attorney General.

Received a copy of the above answer this 27th day of June 1945.
NUEL D. BELNAP,
Attorney for Plaintiff.

196 In the District Court of the United States

Civil Action No. 45–C–1020

[Title omitted.]

Answer of the United States of America

Filed Aug. 4, 1945

Now comes the United States of America, defendant in the above-styled action, and for answer to the complaint herein admits each and all of the allegations in the said complaint contained, and that the relief prayed for should be granted by this Court, and that the order of the Interstate Commerce Commission assailed in the said action (being the said Commission's order of February 13, 1945, in investigation and suspension docket No. 4718, including the report of the same date made a part thereof by reference), should be set aside, insofar as it undertakes to authorize the establishment of rates in conformity with the findings contained in the said report (but not insofar as it requires the cancellation of the rate schedules heretofore filed by the carriers, but the effective date of which has been postponed).

Wherefore, this defendant prays that the relief prayed for by plaintiffs be granted by this Court, and that the aforesaid order of the Interstate Commerce Commission, as set forth above, be set aside as erroneous, arbitrary, unsupported by substantial evidence, and contrary to law.

197 Edward Dumbauld,
EDWARD DUMBAULD,
David O. Mathews,
DAVID O. MATHEWS,
Special Assistants to the Attorney General,
Department of Justice, Washington 25, D. C.

WENDELL BERGE,
Assistant Attorney General.
J. ALBERT WOLL,
United States Attorney.

I certify that copies of the foregoing answer were this day mailed to the following persons: Robert H. Shields, Solicitor; Charles B. Nutting, Associate Solicitor; James K. Knudson, Principal Attorney, United States Department of Agriculture, Wash-

ington 25, D. C.; James A. Doyle, Regional Attorney, United States Department of Agriculture, 208 South La Salle Street, Chicago 4, Illinois; Daniel H. Kunkel, Esq., Interstate Commerce Commission, Washington 25, D. C.

This 27th day of July 1945.

Edward Dumbauld,
EDWARD DUMBAULD,
Special Assistant to the Attorney General.

199 In the District Court of the United States

Civil Action File No. 45–C–1020

Civil Action File No. 45–C–865

Civil Action File No. 45–C–866

[Titles omitted.]

Motion for temporary restraining order

Filed Oct. 4, 1945

Comes now the Secretary of Agriculture, a plaintiff in the above entitled consolidated cause, by its attorney, and moves this court to enter an order temporarily restraining the operation and effect of the order of the Interstate Commerce Commission entered on February 13, 1945, in Investigation and Suspension Docket No. 4718, Grain Proportionals, Ex-barge to Official Territory (which order is reproduced as Appendix "A" in the complaints
200 docketed as Civil Actions File 45–C–865 and 45–C–866 in the foregoing consolidated cases), insofar as said order authorizes and prescribes lawful or proportional or reshipping rates for the transportation of ex-barge grain from Chicago, Illinois, to interstate destinations to the east thereof that is higher than the lawful or proportional or reshipping rates presently in effect on said traffic and higher than the lawful or proportional or reshipping rates contemporaneously provided on ex-rail and ex-lake grain from and to the same points; and temporarily restraining said Interstate Commerce Commission pending the hearing and determination of this cause (and only for the period or periods prescribed by law and the statute in such case made and provided as may be needful to preserve the status quo pending the final decision of the court) from permitting to become effective any tariff or tariff supplements that have been or may be published in conformity with said order (including especially Sup-

plement 133 to Agent B. T. Jones' I. C. C. 3356 and Supplement 27 to Agent B. T. Jones' I. C. C. 3363 issued June 1, 1945, filed with the Interstate Commerce Commission to take effect October 5, 1945); and directing said Interstate Commerce Commission forthwith to take all steps necessary to facilitate the restraint so imposed pending the hearing and determination of this cause, including the suspension of said tariffs, and for such further relief pendente lite as the community of interest represented by the plaintiff herein may appear entitled to receive.

In support of the foregoing motion plaintiff states:

1. Unless the relief pendente lite hereinabove provided for is granted, the farming community for which plaintiff speaks will suffer irreparable injury.

201 2. The motion as filed is based upon a formal refusal of the Interstate Commerce Commission in conference assembled in Washington, D. C., on October 1, 1945, to act affirmatively upon the request of this court and the plaintiffs in the consolidated cases above captioned to suspend the tariffs in issue and *and* the following proper statutory notice duly filed with the Interstate Commerce Commission and the Attorney General on October 1, 1945, in Washington, D. C., by the undersigned as Attorney for the Secretary of Agriculture and under a power of attorney for the other plaintiffs that the application contained herein would be made.

ROBERT H. SHIELDS,
Solicitor,
United States Department of Agriculture,
By James K. Knudson,
JAMES K. KNUDSON,
Principal Attorney,
United States Department of Agriculture,
Attorneys for Plaintiffs.

202 In the District Court of the United States

Civil Action File No. 45–C–1020

Civil Action File No. 45–C–865

Civil Action File No. 45–C–866

[Titles omitted.]

Affidavit of James K. Knudson

James K. Knudson, being first duly sworn, deposes and says that he is of legal age; that he is principal attorney in the Solicitor's Office of the United States Department of Agriculture; that he represents the Secretary of Agriculture in this proceeding and

that the following facts are true to the best of his information, knowledge and belief based upon his years of association with this proceeding and with the farming community for which he speaks:

1. Upwards of 13,000,000 bushels of grain have reached Chicago by barge annually for the last five years.

2. The grain crop this year forecasts a heavy movement to Chicago by barge if the rate situation remains unchanged.

203 3. Grain, a bulk loading commodity is admirably adapted to barge movement. A tow of four barges loaded 30,000 bushels each which represents approximately eighty freight cars of 90,000 pounds. With the present shortage of freight cars for moving grain, barge transportation becomes increasingly important.

4. When grain is brought into Chicago whether by rail, lake or river or in any other manner it reaches a common value. If, therefore, farmers can save freight on the inbound haul they thereby receive a higher net price for their grain. If, however, inbound barge hauls are penalized by refusal of railroads to ship barge grain to eastern destinations on rates equal to rail brought to Chicago by lake or rail, the farmers who would otherwise use the barge line for inbound hauls will be forced either to use the rails at higher rates or absorb the penalty on the outbound haul. This penalty will be levied from October 5 forward unless the Interstate Commerce Commission is required to suspend the tariffs prescribing the penalty.

5. The imposition of the penalty will directly affect 2,115 farmer-shareholders in a farm cooperative maintaining river loading facilities along the Illinois Waterway. Instead of trucking their grain to river elevators where it would be eligible for low barge rates to Chicago, they would be required by economic circumstances to ship their grain by rail to Chicago.

6. The diminution of the movement of grain to riverbank facilities would impair the value and the profits of such facilities, many of which are owned or controlled directly by farmers to a vanishing point.

204 7. The loan values on exbarge grain based on Government loans to the farmers will decline further at the moment exbarge grain is disallowed the advantage of equal rates.

8. A point will be reached in the diminution of barge grain volume where the barge lines themselves will have to raise their rates because of the decrease in volume with resultant detriment to the farmers using this facility.

9. All of the foregoing factual statements are adequately supported in the record of the rate proceeding before the Interstate

Commerce Commission in addition to their being within the knowledge of your Affiant herein.

JAMES K. KNUDSON.

Subscribed and sworn to before me this 4th day of October 1945.

[SEAL] JAMES J. LEWIS, *Notary Public.*

206 In the United States District Court

No. 45–C–865
No. 45–C–866
No. 45–C–1020

[Titles omitted.]

Transcript of proceedings

Filed Oct. 26, 1945

Transcript of proceedings had and evidence taken in the above entitled causes before the Honorable Evan A. Evans, Judge of the United States Circuit Court of Appeals for the Seventh
207 Circuit, and the Honorable Michael L. Igoe and Honorable Walter J. LaBuy, Judges of the United States District Court, in Court Room Number 627, United States Court House, Chicago, Illinois, on Thursday, the 4th day of October, A. D. 1945, at 2:00 o'clock p. m.

Present: Messrs. Lord, Bissell & Kadyk, by Mr. Edward B. Hayes, appeared for A. L. Mechling Barge Line, Plaintiff. Mr. Luther M. Walter, appeared for Inland Waterways Corporation, Cross-Complainant. Mr. James K. Knudson, appeared for the Department of Agriculture, Cross-Plaintiff. Mr. Edward W. Knowlton, appeared for Interstate Commerce Commission, Defendant. Mr. J. Albert Woll, United States District Attorney, by Mr. Kenneth S. Nathan, appeared for the United States of America, Defendant.

208 The CLERK. 45–C–865 consolidated; Mechling Barge Line, et al. v. United States of America, for hearing.

Mr. HAYES. May it please the Court, there were presented this morning certain applications for temporary relief—I am just advised that counsel representing the Interstate Commerce Commission has stepped out of the court room for a moment. May I await his return?

Judge EVANS. Tell him to come back in.

Mr. HAYES. May I introduce Mr. Knowlton, counsel for the Interstate Commerce Commission?

Judge EVANS. Yes; we know Mr. Knowlton.

Mr. KNOWLTON. I apologize for being late.

Judge EVANS. I want to know first who the parties are and who they represent, who do you all represent?

Mr. HAYES. I represent the Plaintiff Petitioner, A. L. Mechling Barge Line.

The Tuland Waterways Corporation is represented by Mr. Luther M. Walter.

The Department of Agriculture, Secretary of Agriculture, in its functions in connection with that Department and as the War Food Administrator, likewise Plaintiff Petitioner, is represented by Mr. James K. Knudson, principal attorney for the Department of Agriculture.

209 The Interstate Commerce Commission, as your Honor is already advised, is represented by Mr. Knowlton.

Judge EVANS. Now, how long are you people going to take to present this question? And who is going to do it?

Mr. HAYES. I am going to make a brief presentation of the whole situation, as brief as is possible. Mr. Walter will present the situation from the standpoint of irreparable injury to his client. And Mr. Knudson will present the situation from the standpoint of irreparable injury to the public interests with which he is charged under the statute in this kind of a proceeding.

There is a little evidence to be taken, your Honor.

Judge EVANS. There is no evidence?

Mr. HAYES. There is a little evidence.

Judge EVANS. Well, perhaps that ought to be taken in the beginning here before we have any argument.

Mr. HAYES. Yes, sir. In order to shorten the proceeding, I have spoken to both—I beg your pardon, Mr. Nathan. Mr. Nathan represents the United States and the Attorney General. I apologize.

I have spoken to Mr. Nathan and also to Mr. Knowlton, and they have agreed that the statements of the witnesses attached to the applications may be taken and received as their

210 evidence. I have advised those gentlemen the affiants are present in court for cross-examination if they desire to cross-examine. They have both stated that they do not care to cross-examine.

Therefore, I offer as the testimony of those respective witnesses, the statements that they have made under oath in connection with the applications on file.

Judge EVANS. Now, the United States and the Interstate Commerce Commisssion and the Secretary of Agriculture are all three represented here?

Mr. HAYES. They are, your Honor.

Judge EVANS. But they are not on the same side?

Mr. HAYES. No, your Honor.

Judge EVANS. On what sides are they?

Mr. HAYES. The Secretary of Agriculture is a plaintiff petitioner.

Judge EVANS. And the United States?

Mr. HAYES. The United States of America, which is a necessary defendant under the statute, the statutory defendant in fact, is a defendant. The United States has filed an answer in this proceeding. I do not know whether your Honors have read it or not. I presume you have.

There is an intervening defendant in two of the cases, the Interstate Commerce Commission, which was likewise made a defendant in the third of the consolidated causes.

211 The terms of the answer of the United States of America, as I read them, admit the averments of the complaint. Such answers have been filed, of course, in all the cases and ask that relief as prayed for be granted.

The only adverse position to the relief prayed is taken by the Interstate Commerce Commission.

Judge EVANS. It is the order of the Interstate Commerce Commission which is being assailed?

Mr. HAYES. That is correct, your Honor.

Judge EVANS. Now, then, do the three parties stipulate and agree that one record can be made in all three cases, or do they have to be separate with one record in each case?

Mr. HAYES. There has been an order of consolidation, your Honor.

Judge EVANS. I see. Now, go ahead.

Mr. HAYES. I have made an offer as I described of the evidence of the several witnesses, J. L. McClintock, F. A. Mechlin, Norman C. Harris, and M. C. Knudson, and pursuant to the agreement which I described, I ask that they be received as their testimony in this hearing.

Judge EVANS. Any objection? It is received.

Mr. HAYNES. These witnesses are present and are tendered for cross-examination.

212 I understand that there is no desire to cross examine them by either of counsel for these defendants.

I offer in evidence certified copies of two supplements to tariffs of the eastern railroads for the carriage of grain reshipped from Chicago to the east, which will become effective tomorrow, and both of which state on the face "Issued in conformity with findings of the Interstate Commerce Commission in I & S Docket 4718, as decided February 13, 1945," which is the order here under attack.

I offer these as Exhibits A and A–1; A being supplement 133 and A–1 supplement number 27 of the tariffs respectively therein named, as evidence in this hearing.

Judge EVANS. Received, no objection.

(Said documents, so offered and received in evidence, were marked "Plaintiff's Exhibits A and A–1," respectively.)

Mr. HAYES. I do no know whether counsel for defendants, or either of them, have any evidence to offer or not.

Mr. KNOWLTON. The Commission has no evidence to offer.

Mr. NATHAN. The United States has no edivence offer.

213 Judge EVANS. Very well; testimony closed.

Mr. HAYES. If the Court please, this is an application pendente lite for relief, pending the proceeding to preserve the status quo pending the determination of the legal correctness of the action of the Interstate Commerce Commission pursuant to the Urgent Deficiencies Act, which is 28 U. S. Code Annotated, Section 47.

I presume it is unnecessary for me to read the text of the statute. I have it here.

Usually, of course, as this Court knows, applications to preserve the status quo pending the action of this Court when called to the attention of the Interstate Commerce Commission, results in action of its own motion to preserve it without the necessity of any interlocutory relief.

It appears from the affidavits filed, and I believe from the communication which the Court has received from the Interstate Commerce Commission, that the Commission in this case seemed to prefer that there should be a temporary relief which is authorized by the Act.

The situation very briefly is this, it goes back beyond 1939, earlier than that, and all the eastern railroads transport grain out of Chicago to the east and make the same charge for

214 their services without regard to whether the grain, which is a fungible commodity, arrived in Chicago and came to their hands by means of the connecting barge carriers, the connecting rail lines, or by lake vessel over the lakes, in 1939, for the purpose, as stated by their representative before the Commission, and I quote him, "of driving the barge traffic off the water and back on the rails where it belongs," he said; the railroads propose to charge 8½ cents more for their service in transporting east the grain that had arrived in Chicago by barge than they charge for this service on lake-arrived or rail-arrived grain.

The Interstate Commerce Commission suspended that proposal and investigated that proposal, and determined in the end that it would not interfere with that proposal but would permit it to go into effect.

That order was reviewed by this Court and enjoined by this Court. There was an appeal to the Supreme Court of the United States.

The Supreme Court of the United States held that contrary to the supposition of the parties, and contrary to the supposition of this Court at the time, the Interstate Commerce Commission in permitting that rate to go into effect, that 8½-cent penalty, had not approved it.

215 The Court expressly stated that the rates stood without the approval either of the Interstate Commerce Commission or of the Supreme Court of the United States. I have the text of that decision here but your Honors are unquestionably familiar with it.

The Court dwelled at length upon the statement of the Commission in its order permitting that penalty to go into effect, that it might some day hold a proceeding to determine what rates ought to be applied for the transportation of ex-barge grain out of Chicago to the east.

In view of the fact that that statement occurred in the Commission's report and also in view of the fact that the Supreme Court had dwelt upon it, the barge carriers and certain shippers filed applications before the Commission asking it to exercise its powers to prescribe the level of rates that ought to prevail for the transportation of that ex-barge grain to the east. That power is granted to the Commission by Section 611b of the Interstate Commerce Act, as Mr. Knowlton will agree.

Thereupon, the Commission entered an order for a further hearing. It had been requested that the record already made before the Commission be kept available as well as any
216 further record that might be made. That request was granted and I will read, if I may—there seems to be some apparent lack of agreement between counsel for the Commission and ourselves as to the issues that were before the Commission.

Judge Evans. Have you got a copy of that opinion now here, of the Supreme Court opinion?

Mr. Hayes. Yes, sir; I have [handing document to the Court]. I will read, if I may, some of the language from that opinion.

"This form of finding"—

that is in that order that was previously under review here—

"has been held by the Commission not to constitute an approval or a prescription of the rates under suspension. Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations. Like the Commission, we also refrain from approving or prescribing them."

Judge Evans. Go on with the history of the proceedings.

Mr. HAYES. Yes, sir. The order entered by the Commission fixing the further hearing here, reads

217 "It appearing, that in the report of the Commission on reconsideration in the above entitled proceeding, the Commission said that 'In a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.'

"It further appearing, That motions requesting leave to file petitions for rehearing and for an order fixing specific reshipping rates on ex-barge grain, together with such petitions, have been filed by"—

and then naming the parties—

"and that said petitioners request rehearing for the purpose of presenting evidence which will permit the Commission to prescribe and fix reshipping rates on ex-barge grain predicated on the particular circumstances and conditions which surround its transportation;

"It further appearing, That the said petitions in effect are complaints which bring in issue the lawfulness of rates applicable on the through movement of the traffic considered in the instant proceeding; and that the record therein may be of assistance in determination of the issues presented by said petitions.

218 "And it further appearing, That the said petitions and replies thereto have been considered in the light of the record herein and the opinion of the Supreme Court of the United States in"—

naming the opinion in the case from which I just read to your Honors—

"It is ordered, That this proceeding be, and it is hereby, reopened for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by railroad of ex-barge grain, in carloads, from Chicago, Illinois, and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic, and (2) to determine what, if any,"

joint rates should be prescribed. They did not prescribe any joint rates.

"And it is further ordered, That this proceeding be, and it is hereby assigned for further hearing,"

and so forth.

219 Pursuant to the order hearings were held and were held extensively, and upon those hearings and the record formally made an order was entered.

The order is in the form of the usual form of a report and an ordering part. The ordering part of this is on page 72 of the complaint before this Court, of the A. L. Mechling Barge Line, refers to the report part and says:

"Which report, together with said reports of July 31, and December 1, 1941, are hereby referred to and made a part hereof,"

namely, of the order,

I read from the portion of the order so incorporated, and this is on page 72 of the complaint before this Court by the A. L. Mechling Barge Line—no, it is not; it is 53, the part I want to read from. I already read from the other page.

"We further find that reasonable and otherwise lawful proportional rates for interstate transportation by rail of ex-barge grain in carloads from Chicago, Illinois, to eastern destinations, considered herein under Sections 1, 2, 31, 34, 611 b,"

which is the section giving the Commission power to fix and prescribe proportional rates of rail-water traffic—

"and 15A2 of the Interstate Commerce Act discussed with a view,"

220 and so forth,

"will be those made differential under local rail rates which are or may be hereafter currently maintained from Chicago as set forth below, with the customary differentials on products in export traffic which are no less favorable to ex-barge traffic and no more favorable to ex-rail and ex-lake traffic than represented by the relation between such prescribed ex-barge proportionals on the one hand, and the present ex-rail and ex-lake proportionals specifically on the other hand."

Then follows a heading, schedules with headings. Two columns, one with "In re: Local Rail Rates."

Judge Evans. Tell me more about it. I don't quite understand the last three lines of that. What does it mean when it says: "no more favorable than is represented by the relation between such prescribed ex-barge proportionals on the one hand, and the present ex-rail and ex-lake proportionals specifically on the other hand?"

Mr. Hayes. Yes. The answer, if your Honor please, is this: From Chicago to the east there is on the transportation of grain that is moved into Chicago, prior transportation movement and proportional rate level which proportional rate level is

221 lower than the rate level which contemporaneously applies on grain which has had no antecedent transportation up to Chicago. And what the Commission did in form was to fix

proportional rates on the ex-barge grain that were lower than the local rail rates, but which were higher than the proportional rail rates. And, of course, so far as the local——

Judge EVANS. Now, just get to the grievance. The Interstate Commerce Commission's present order is more favorable to the water competition than those old rates?

Mr. HAYES. Indeed, yes, your Honor.

Judge EVANS. But it is not yet on an equal footing with the railroad, with the rates on shipments where the grain came from the west to Chicago and went on to New York?

Mr. HAYES. That is right, your Honor.

Judge EVANS. And that is the only point now in dispute, is it?

Mr. HAYES. Well, there is also the fact that it is not on an equal footing even with the rates which prevail on grain that comes off the lakes to Chicago. It is higher even than that.

Now, that is the situation, as my associate asks me to make plain, and I assume your Honor has it in mind, that will
222 prevail if these tariffs become effective, then we will have that higher charge of 3 cents higher than the proportional rate on ex-barge grain than on the ex-rail and ex-lake grain. At the present time, and for many years heretofore, those rates are on the same level. I assumed that was clear to the Court.

Do I fully answer your question?

Judge EVANS. Yes. I was just kind of wondering what the percentage is relatively, or what the situation is in reference to this order as compared to the old order.

Mr. HAYES. The old order, to put it very briefly, permitted to go into effect an 8½ cent penalty on ex-barge grain to eastern destinations. This order permits to go into effect a 3-cent penalty. When I say 8½ and 3, I mean per hundred pounds on ex-barge grain, a uniform penalty put on to all New England and eastern trunk-line destinations. And also permits——

Judge EVANS. The last time, under the 8½ cents, you endeavored to secure an injunction prohibiting that to be done. You got it here but you lost it in the Supreme Court. How do you expect to get it back? On what ground?

Mr. HAYES. On this ground, your Honor: If the order of the Interstate Commerce Commission had approved or prescribed an 8½ cent penalty, then the action of the Supreme Court
223 would have been just the same as the action of your Honors here. The point and gist of the decision of the Supreme Court is that the Commission had not approved and prescribed any rate whatever.

Judge EVANS. Do you agree to that, Counsel for the Interstate Commerce Commission?

Mr. KNOWLTON. The Supreme Court sustained the validity of the order but I think the Commission felt it had the power——

Judge EVANS. I understand they could, but do you agree that the Supreme Court's decision did not sustain the validity of your order?

Mr. KNOWLTON. It did sustain the validity of the order.

Judge EVANS. He says all they did was to say that you had jurisdiction but had not approved of the order.

Mr. HAYES. Approved of the rate.

Judge EVANS. Approved of the rate, and therefore they held under those circumstances that there could not be any modification of your order.

Mr. KNOWLTON. The Commission held that the rates were not unlawful, but it also said that on a fuller record it might arrive at different and lower proportionals.

Judge EVANS. And you did that on further hearing.

Mr. KNOWLTON. Yes, on the second hearing.

224 Judge EVANS. Now, the point I am trying to get at is whether it is agreed that the order of the Interstate Commerce Commission made at the present time may be enjoined by us, notwithstanding the proceedings before the Court on the previous trial or hearing? In other words, does the decision of the Supreme Court constitute a holding that guides us in this case?

Mr. KNOWLTON. No, sir; I do not think so. I think you are entirely free so far as that is concerned.

Judge EVANS. We may be on the question of fact but on the question of law; does the Supreme Court go so far as to reverse us the last time and sustain the Interstate Commerce Commission because the Interstate Commerce Commission's ruling approved, or indirectly approved, of the rate which the railroads put in force and which was discriminatory against the water?

Mr. KNOWLTON. I think the Supreme Court's decision indicates that it would approve the action that the Commission took. It did not hold that the report was without adequate finding or that the order was without substantial evidence, but recognized that it was a suspension proceeding and that countless questions might arise in such proceeding and that to hold or sustain the District Court would practically make the Commission's suspension

225 authority a thing that would be very seldom exercised. But I think, your Honor, that the Commission and yourselves are just as free as if the court had held in effect and remanded the case for further evidence.

Mr. HAYES. Counsel for the Commission has indicated that he thinks the Supreme Court approved the action that the Commission took. May I read briefly——

Judge EVANS. Since he says it does not make any difference whether they indirectly approved it, and he says it does not enter into our consideration, we will proceed on that theory.

Mr. HAYES. They were quite explicit that the Commission did not directly or indirectly or in any way approve that 8½ cent rate.

Judge EVANS. Well, whether they did or not, they thought they did and I still think they did.

Mr. HAYES. Well, that is what we thought, too. But the point I am making is that the Supreme Court did not reverse this court on the premise that the Commission had approved that rate at all.

Judge EVANS. All right, proceed.

Mr. HAYES. Now, I have made plain that the authority of the Commission to prescribe these ex-barge rates is plain under 611 b, that on request to the Commission pursuant to its own
226 suggestion it might do that, and the Supreme Court indicates that it said it would, so that it should go ahead and do that, and the order of the Commission was it would set this hearing to do that. And that language of the order is that those rates are prescribed, and the heading is "Differential ex-barge rates under local rates," and so forth, indicating that it is mandatory language.

And also on page 51 there is another reference to the ex-barge rates herein prescribed, if I have that page number right. No, it is 41, not 51:

"This creates an unjustified disparity"—

they are talking about the 8½ cent rate—

"which will likewise be avoided by the proportional rates prescribed."

and so on, and the net result is,

"resulting in barge-rail combinations on this Cleveland,"

and so on.

In other words, what the Commission did was as I have described, but the Commission did not order that prescribed level to go into effect at any particular time. It just said it was going to prescribe, if it was asked to prescribe, it would enter an order saying it would prescribe it and by the terms of its order it did
227 prescribe it but it did not order it to go into effect any particular time. That perhaps would have been supererogation because it was an order permitting the railroad to charge a higher level of rates than they were then charging, and the railroads did file tariffs charging all the traffic would bear and what the Commission permitted. Those are the tariffs which have been introduced in evidence in this hearing.

I understand there has been some correspondence in which it has been suggested that this order did not do anything. It seems to me apparent from the history of the proceedings, as I have stated it, that this order does prescribe the level of ex-barge rates which shall be lawful for grain reshipped from Chicago, Illinois.

In the Columbia Broadcasting case—your Honors are undoubtedly familiar with it—the Supreme Court was confronted with a similar order. The orders of the Federal Communications Commission are subject to review under this same statute by a three-judge court; and the Federal Communications Commission had said that if the Columbia Broadcasting Company and any station licensed by it had in effect a contract extending over a certain period, that might be grounds for revocation of the license of the broadcasting company.

Thereafter the National Broadcasting Company, although
228 the order was not directed against it, and although no license had been suspended, brought an action for review of the order and asked that the court enjoin it. It was met with the argument that, "nobody has done anything to you yet. You were not made a target of this order and you will have to wait until the Federal Communications Commission passes on the question involving administrative discretion on whether or not they will revoke any license, and then come and make your complaint, that this announcement is just like a press release of the policy of the Federal Communications Commission."

The Supreme Court made very short work of that argument. It said among other things:

"The Commission's order is, we hold, a reviewable order and the appellant is free to seek review under Section 402a of the Urgent Deficiencies Act. It is not, therefore, as the court below seemed to think, improper substituting a different procedure in court from that which Congress has prescribed for the trial of like issues, so far as they may be raised on a review of the order denying the license, and such issues may likewise be"——

Judge EVANS. Don't you think, you know you fellows are
229 full of this subject and we are occupied by other things, I would kind of like to get a statement of the Interstate Commerce Commission, sort of giving specifically what its position is, what its concessions are, and then you can shoot at him after the thing is over, all of you.

Mr. HAYES. All right.

Judge EVANS. I would like to know just how far you are willing to go and what can be done, and on what theory you sustain the order, and so forth.

Mr. KNOWLTON. That is simply on the question of the restraining order, as I understand it, your Honor?

Judge EVANS. Well, I presume so, but generally speaking, if you haven't got any merit at all in the order, why, the restraining order would follow; and all we are concerned with right now is the restraining order.

Mr. KNOWLTON. Yes. I ask that because Mr. Kunkle, who is in charge of this case, had to go onto another case at Oklahoma City and I took this upon three days' notice, I just go notice on Sunday.

Judge EVANS. You know a lot more about it than I do.

Mr. KNOWLTON. While I have gone into the restraining order part, your Honor, pretty thoroughly, I haven't devoted much time to the merits.

Judge EVANS. You see, I would not want you to limit
230 yourself to technical objections to the restraining order rather than the merits. They are assailing your order and enjoining it. I want to know what is your theory of sustaining the order. I don't mean by that to be antagonistic to you; I just want to know what your theory is in sustaining it, and to make such concessions as you can so these gentlemen won't have to be arguing and enlightening us on a lot of things we really need enlightening on, but which if you admit are out of the case.

Mr. KNOWLTON. Well, so far as the validity of the order from the standpoint of findings and substantial evidence, good full evidence, proper criteria, our judgment is it is a sound order. In this case, from the standpoint of the railroads, as you know, the Commission's statutory period suspended the first rates and thereafter they were voluntarily suspended or postponed by the railroads through the first court cases, except for the period of injunction, and through the second proceeding which is the one involved here.

So that if the Commission's order is sound, and I think it is, I think it is fair, on these proportional rates, and I do not think from the standpoint of equity there is any necessity of restraining the order. The Commission's suspension power, as you know is
231 given to it in connection with the undertaking of investigations into the lawfulness of rates which are proposed. That is the reason it is given to it, but it may enter into an investigation of proposed rates and be of the view that they should not be suspended.

Now, of course, these rates are in somewhat different category from the entirely carrier-initiated rates, in that the Commission in this proceeding which was just held not only found that the proposed higher local rates were not lawful but it also found that certain rates would be lawful in its order. It did not require them to be filed. The nature of the schedule which was before it was a schedule filed by the railroads, the effect of which proposed higher locals because and for the reason that it was cancelling the

regular proportional rates in their application to this ex-barge grain outbound from Chicago, and those the Commission suspended. No, those the Commission's order cancelled after this last proceeding, and the effect of that was to further continue applying on the traffic the lower or standard proportional rates.

Now, of course, taking that order, if that were restrained by the Court that would not accomplish the purpose, the plaintiff's purpose. They have now got the standard proportionals. The proposed increase to the higher local was found unlawful
232 and ordered cancelled without prejudice, and the Commission states in the report that action was without prejudice to the filing of the new rates which it had found to be lawful. It did not order them in, and just what the status of that without prejudice clause is, or the statement, is important here.

But, in any event, the point is they are not quite like carrier-initiated rates but they could have been protested, that kind of rate is protested.

Now, the Commission on its own initiative would not be expected, since it has just been through a hearing and found that these rates would be lawful when they were filed, it would not likely have reason for suspending them because the suspension, as I have said, is in connection with an investigation into the lawfulness of the rates suspended. If they had been protested, it might be that reasonable grounds would have been disclosed to further investigate their lawfulness, and therefore clothe the Commission with authority to suspend, but no protests were filed.

So that my principal interest, at least the Commission's reason for appearing here and opposing the application for the restraining order is one concerning its administrative authority, let us say, and principally because the plaintiffs have neglected to
233 join the railroads as defendants, and now ask the Court to order the Commission to suspend those rates filed and published by the railroads.

But first off, I want to refer again to the order whose operation they ask be restrained. That, as I say, was an order which had the effect of proposing higher local rates because it proposed the cancellation of the lower proportionals in their application to this traffic. So that when it was ordered cancelled, the effect was not only to deny the increase to the local but was to further continue, as had been for all this long time, the standard proportional rates.

Now, as I have said just a minute ago, for the Court to suspend that simply would not accomplish the plaintiffs' purpose, but they say that the Commission's action by its statement that its action was without prejudice, that its order was without prejudice to the filing of the new rates that it had authorized that it found lawful, they say that was an authorization of the rates.

I do not think that this is so in the sense of a formal order of authorization. However, and moreover, even assuming that it is an authorization that can be restrained, the restraining order in order to accomplish its purpose must prevent the new rates
234 from becoming effective, and it is because of this presumably and because the railroads are not made defendants that the plaintiffs ask that the Court order the Commission to suspend the railroads' rates, but by doing this they ask the Court to exceed its authority, for the Commission's suspension power is one of discretion. And, moreover, as I said, it is not a power apart from its entering into an investigation into the lawfulness of the rates which are suspended.

Now, the Commission had no reason, as I say, that was apparent on its own initiative to suspend those rates, and there were no protests calling anything to its attention, and therefore it might be said because of its own judgment that it was powerless to suspend. But, in any event, both the entering into the investigation and the suspension in connection with the investigation, or the nonsuspending, are very clearly shown by the decisions of the Supreme Court and the lower court to be discretionary and something exclusively for the Commission, and therefore my chief point and my chief reason in opposing the application for the restraining order is that they ask this Court to infringe that discretion.

Judge EVANS. I understand that practically what your opponents are trying to get at, is to eliminate the charge which
235 is made for carrying the grain from Chicago to New York or to the eastern seaboard, eliminate that extra charge that has to be made because of the differential—I guess they call it, or whatever it is—because the grain shipments originated west of Chicago, it being grain that originated west of Chicago the rate that is charged from Chicago to New York is greater than it would be if the regular rate from Chicago to New York was invoked. Is that correct?

Mr. KNOWLTON. Yes.

Judge IGOE. That is not the way I understand it. I understand their complaint is that a penalty has been imposed upon the barge lines.

Judge EVANS. Well, I am coming to that in a second. I want to know now what the rate from Chicago to New York is if the penalty is imposed upon it.

Judge IGOE. Imposed on the barge line rates.

Mr. WALTER. 26 cents. That is the base rate which your Honor inquires about, the reshipping rate on grain now in effect from Chicago to New York on all kinds of grain, whether arrived in
9 Chicago by barge, rail, or lake.

Judge IGOE. It is what?

Mr. WALTERS. 26 cents a hundred, and the proposal is to make it or leave it 26 cents for lake and rail arrived grain, but increase it by 3 cents.

236 Judge IGOE. What is the reason in that case for that 3-cent increase?

Judge EVANS. That is what I have been trying to get specifically.

Mr. WALTER. That question is addressed to Mr. Knowlton.

Judge IGOE. Does the Interstate Commerce Commission indicate any reason for that increase?

Mr. KNOWLTON. I think so, your Honor.

Judge IGOE. What is it?

Mr. KNOWLTON. I am really not in shape to answer the question.

Judge IGOE. That is the main question here, isn't it?

Judge EVANS. He has just come in to take the place of another person.

Judge IGOE. I understand that, but that is the main question that is before us here.

Mr. KNOWLTON. I think I stated that I have not been able to go into the merits.

Judge IGOE. As I understand the other part of the argument is that if this new proposed rate is set aside and enjoined, then you go back to the old rate which is higher than this one.

Mr. KNOWLTON. You mean——

Judge IGOE. You say our action would be futile if
237 we took it here because it would not give them any relief. Why?

Mr. KNOWLTON. You mean just the suspending of the order?

Judge IGOE. Yes. Why wouldn't that give them relief?

Mr. KNOWLTON. The suspending of the order? Because the order requires the cancellation of the proposed higher local.

Judge IGOE. Yes.

Mr. KNOWLTON. And also that would leave the standard proportional in effect. Now, if you suspend the cancelling order, you see it does not accomplish the purpose.

Judge IGOE. Is the proportional rate higher than the one proposed in this tariff?

Mr. KNOWLTON. No, the proposal is lower.

Judge IGOE. Then why wouldn't they get relief?

Mr. KNOWLTON. They have relief now. They would have relief under the Commission's order cancelling the proposed local rate and leaving in effect the proportional, the regular proportional reshipping rate.

Now, if that part of the order is suspended, why, it would not accomplish the purpose that they want, the suspension of the new rates.

Judge IGOE. What is the present rate?

238 Mr. KNOWLTON. The present rate is the regular standard reshipping rate that is applicable to all kinds of traffic outbound.

Judge IGOE. And this proposed change would raise that rate so far as the barge grain is concerned, wouldn't it?

Mr. KNOWLTON. Yes, it is an in-between rate, between the higher regular rate and what I call the standard proportional or reshipping rate. It is in between those points.

Judge IGOE. If this rate is not put into effect, then the present rates that are now applicable would be lower than the one you propose by this new rate; isn't that true?

Mr. KNOWLTON. It would, by the Commission's order of cancellation now.

Judge IGOE. Then I didn't follow you when you say the relief asked for here if granted them, they would not get any relief out of it.

Mr. KNOWLTON. Well, what I am speaking of is the mere postponing or suspending of the order that was entered.

Now, in addition to that, it was the without prejudice statement of the Commission, without prejudice to the filing of these new rates which were prescribed. But those rates are not controlled by the Commission's order.

239 Judge IGOE. You mean the railroad companies just put them into effect then?

Mr. KNOWLTON. That is why I say, yes. That is the point I make, in order to accomplish what is desired here and to really give the restraint, the Court would have to—because the railroads are not here to defend—they would have to order the Commission to suspend, and as I pointed out, there is no occasion for going into a new investigation, no reason for the Commission in its judgment to go into a new investigation on these rates which it has already investigated; it would have no power to institute any such investigation. So the Court would, in doing what is asked, not only infringe on the usual suspension authority of the Commission, but it would really be making them do something which it is powerless to do unless there is a reason for again going into the lawfulness of the rates. Now, that is the point I make there.

And also that I know of no case where the Court has purported to control the suspension discretion of the Commission, and the cases are quite to the contrary.

Judge IGOE. By that do you mean the railroads would file new rates?

Mr. KNOWLTON. The railroads would file new rates with
240 the Commission.

Judge IGOE. They would file new rates. In other words, if this injunctional order were entered, you say that would give no relief to the parties who are seeking relief here?

Mr. KNOWLTON. Not unless the order, or the application made here does apply, not only for a restraining order which would stop the operation of the actual order entered, but it would also, the rates being in effect, that is being filed to become effective very shortly, the enjoining of that order which does not require them and which has to do with something really different, it would not accomplish the purpose.

Judge EVANS. Wouldn't we have authority at the same time, if we grant the relief of the restraining order, also have authority to restrain the enforcement or putting into effect of those rates?

Mr. KNOWLTON. Against the railroads?

Judge EVANS. Well, right here and now.

Mr. KNOWLTON. Or against the Commission? My point is that you haven't got that authority.

Judge EVANS. If we should order the railroads brought in, we could do so.

Mr. KNOWLTON. It is my view you could, sir, but I know
241 some of the railroads take the position you could not; but it is my view you could.

Judge EVANS. But we could not do it without the railroads being present or parties to the proceeding.

Mr. KNOWLTON. Your order could not run against the railroads, and to make it run against us, as I explained, is controlling our discretion in the matter of suspension also.

Judge EVANS. I understand that point, but I mean only on the railroads. All right, we have got your point, and now we will hear your opponent.

The first question is whether or not we should continue the hearing for two purposes; one is until the counsel who has been in the case and is familiar with the order itself, returns rather than this counsel who has been brought in on one point, could be here. The second one is as to the advisability of getting the railroads in.

Mr. HAYES. I will address myself to those two things, your Honor.

The point is this, there will be irreparable injury unless the relief here prayed for is granted today for the reason that unless that relief is granted today, including the restraint directed to the Commission from permitting these rates to go into effect, then

they will go into effect at midnight tonight and then
242 all of the consequences or more——

Judge EVANS. I do not think that would necessarily follow in a short case like this as being irreparable, but let us assume that it is. It is something we don't want.

Mr. HAYES. Your Honor has in mind the short time that they are involved. I was about to say that once those rates have gone into effect, then the argument which has been addressed to your Honor might acquire validity, and then there would be a question as to the right of the Commission to suspend a rate that had gone into effect.

Judge EVANS. Well, we can meet that, that is of secondary importance. We can, for that matter, if we are going to continue it for another date, grant the injunction or restraining order here today until the further order of the Court.

Mr. HAYES. I only ask, your Honor, for this restraining order for a period of 60 days which is the maximum that the statute permits, anyway.

Judge EVANS. As far as I am concerned, I will go farther, if I think they are entitled to it, than 60 days, providing you are right. If you are not right at all, you ought not to have any more than enough days to find out in the proper time.

243 Mr. HAYES. That is true.

Judge EVANS. Now, those are the two things. It strikes me offhand there is something serious about this necessity of having the real adversary here, which is the railroads.

Mr. HAYES. If your Honor please, the statute under which we are acting has made by its terms the defendant. The action shall be against the United States of America. Now, the railroads and the Interstate Commerce Commission, and anyone who is interested, has the right to intervene. They knew of it, of course. This bill as filed prays for preliminary as well as final relief. They have not seen fit to intervene and the terms of the Act makes the defendant the one that is named, namely, the United States. The Interstate Commerce Commission and it alone has intervened in any of the cases. It was their privilege to intervene. We have followed the statutory method. We would suffer irreparable injury not only for the short period but also in respect of the serious question of your Honor's right to direct the Commission to suspend after the rate had taken effect. But before it takes effect, there is absolutely no question about it.

Counsel says there would be no occasion for going into a
244 new investigation because a long investigation has been concluded. What he means is the Commission would not suspend these rates under any circumstances, whoever asked them to. There may be occasion to suspend these rates if the Commis-

sion has acted unlawfully in prescribing them, and it is the precise purpose of the statue to give this Court the function of determining if the Commission has made that mistake, and if this Court holds it has, then there is furnished sufficient reason for going into a new investigation along the lines of the principles laid down by the decision of the Court. But that will be forestalled unless these rates are prevented from taking effect, and the argument will be made to your Honors, you could have enjoined, you refused to do so, you permitted the rates to go into effect, and now nothing can be done until such time as the Commission has concluded an investigation if anybody asks for it.

Judge EVANS. I am not so very seriously impressed, to tell the truth, about that. But where proceedings were had and we were endeavoring to get the real merits of the case and counsel did not appear or something, and we postponed it, I think we could correct anything that happened. But I am more concerned in trying to get this thing correct and right.

Mr. HAYES. It appreciate that.

245 Judge EVANS. Now, the Interstate Commerce Commission, following the Supreme Court's decision, did not celebrate a victory but went to work and sought to correct this extra charge that was being placed upon the freight that originated in barges. It corrected it all until it got down to where it says, "with the customary differentials on the products and export traffic, and which are no less favorable to the ex-barge traffic and no more favorable to the ex-rail and ex-lake traffic than is represented." You see, they are not, or at least the rule is here that they are not going to favor the rail nor the barge traffic. The only difference that they are going to recognize so far as being favorable is by the relation between such prescribed ex-barge proportionals on the one hand and the present ex-rail and ex-lake proportionals or specifics on the other. Now, frankly, that is pretty nearly Greek to me.

Mr. HAYES. May I make my poor attempt, your Honor, at a translation of that traffic jargon?

Judge EVANS. Am I right to say that they wanted to be no more favorable to one than to the other, notwithstanding whatever they may have done before, except that it is represented by the proportionals? Can you tell me that?

Mr. HAYES. Let me put it in the terms of a specific
246 example, May I?

Let's say that the rate on local grain that starts right here in Chicago and which was grown at State and Madison Streets, from Chicago to New York is 34½ cents, as it is; but let us say that the reshipping rate on grain that is coming in from the west by means of transportation not over the lake is 26 cents, as it is;

and then let us say the people who are interested in the grain which is shipped into Chicago who, may I be conservative, outnumber those interested in grain grown at State and Madison Streets which would take that local rate, are then subjected by the Interstate Commerce Commission to a prescribed rate of 29 cents from Chicago to New York if their grain that they buy on this market comes in by barge, but can go to New York for 26 cents if the grain that they buy on this market came in by rail.

There you have the situation.

Judge EVANS. But would that be consistent with the statement "with the customary differentials on the products and export traffic"?

Mr. HAYES. That, your Honor, has no reference to the situation which we are referring to.

Judge EVANS. "Which are no less favorable to the ex-barge traffic and no more favorable to the ex-rail and
247 ex-lake traffic than is represented." Is that difference the 3 cents and is your statement consistent with that?

Mr. HAYES. My statement is absolutely consistent with that. The two things are incidental. The differential, which is the one will be lawful—and I have been giving the base level—that differential is the one which always obtains with respect to grain that is meant for export as against grain which is domestic.

Judge EVANS. Yes.

Mr. HAYES. And as between raw grain and processed grain. So that is not in our problem.

Now, what you could do if you took the figures that I mentioned, 34½ cents for the grain at State and Madison Streets, and 26 cents for the rail grain and lake grain, and 29 cents for the barge grain, is to do this: You could say that the proportional on ex-barge is 29 cents and the proportional on ex-barge has got to be that much lower than the local rate. But in the same terms and in the same breath when you say that that is the rate that you are going to prescribe in terms of its relationship to the local rate, you are, when you have so prescribed it in terms of its relationship to the local, prescribing it also as higher in terms of its relationship
248 to the 26-cent proportional which everybody else's grain gets. And the only reason, in my opinion, that that statement was put in that form in the report was to avoid what has been done there and elsewhere in the report, showing on the face so that he who ran might read, that they were prescribing, as they have done, 29 cents for everybody's grain that comes in by barge, and 26 cents for everybody's grain that came in by lake.

Judge LOOE. What reason do they give for that?

Mr. HAYES. Why did they say that?

Judge IGOE. Let me ask Mr. Knowlton who disclaims any knowledge about that, what is your answer to that, do you know? What is the reason given for that differential?

Mr. HAYES. You mean the reason for that differential?

Judge IGOE. Yes.

Mr. HAYES. Here is the reason according to the report. What they say they did was to take all of the rail origins and then take all of the water origins.

Judge IGOE. By water you mean lake or barge?

Mr. HAYES. No sir; I mean the Inland Waterways barge. And then they averaged the distance of the inbound rail haul. This is what they say they did. And then they say they averaged the distance of the inbound water hauls and they found, they
249 say, that the average inbound hauls by rail were longer than the average inbound hauls by water; and therefore, they say, we will prescribe a higher proportional rate for that which comes in at present and presently by water for the on-movement than we prescribe for the rail.

Now, in so doing they ignore what, and this is getting to the merits of the case, what one might call, perhaps the real cogent facts of the situation. The statute prescribes that as between connecting carriers, in this case lake, rail, and barge, the outbound carrier shall not discriminate in its rates, fares, and charges against the traffic of any connecting carrier, including explicitly and expressly incoming carriers by water such as these plaintiffs are.

Now, it is our position that that statute is addressed to the situation in which the incoming carrier, let us say, who is a rail carrier from St. Louis, and an incoming carrier who is a water carrier from St. Louis, or from any other common origin west of Chicago which has water and rail combined, is in the position of needing an out-movement from the transit point here in Chicago in order to get any traffic at all. When the Commission includes in such an alleged calculation—they did not make it and the record so shows—but when they include in such an al-
250 leged calculation rail origins clear back to the Rocky Mountains that are not water competitive at all, and applies factors so derived to the relative competitive situation of grain originating in St. Louis which can come to Chicago by either rail or water, they are considering as a basis for their position a matter which is wholly irrelevant to the purpose which was intended to be accomplished by the statute which said, "The on-carrier shall not discriminate in its rates, fares, and charges against the traffic of any connecting carrier."

Judge EVANS. To be a little bit more specific, is the on-carrier necessarily discriminating if he charges one originating carrier

a little more for hauling his freight, based upon the length of the haul, we will say, and on the circumstances under which the haul is made, does discrimination take place when there is a difference in the rates?

Mr. HAYES. As between grain for the same origins west of Chicago?

Judge EVANS. Yes.

Mr. HAYES. That is our point.

Judge EVANS. Some point west of the Mississippi and another one 300 miles west of the Mississippi, or any other?

Mr. HAYES. No, your Honor, that is not quite right.

251 Judge EVANS. All of these cases are cases that come to this Court, to the first court to be decided only to be reversed by the Supreme Court saying, well, the Interstate Commerce Commission has a lot of factors to take into consideration and we must not disturb anything that they do because they are possessed of so much factual information that the rest of us do not have. Like the southern freight rates on coal, the coal rates that we have had here. I must take into consideration economic conditions and economic questions. And it sort of strikes me offhand it might be that the Interstate Commerce Commission might in determining whether a rate which shall be charged from this point is dependent upon the distance of the haul, or the circumstances under which the freight is hauled, under which the commodity is hauled.

Mr. HAYES. That is right. We do not object if they do that.

Judge EVANS. Well, it seems to me that is pretty nearly the basis of their decision on the merits.

Mr. HAYES. Well, we are not going into the merits yet, but let me address myself just as directly and earnestly to what your Honor has said as I can.

Forgive me if I put it in terms of my conviction and
252 positiveness. They did not do that. They pretended to do that. I have no objection if they want to make a differ-out-rate for the grain that comes in from the Rocky Mountains than they make for grain that comes in from Morris. That will suit me perfectly.

My objection is that when that grain comes in from Morris, whether it comes in by barge or whether it comes in by rail to Chicago, Illinois, then it is discrimination to charge a higher sum for the out-movement just because that grain came in from that common point by barge than is charged when it comes in by rail.

Judge IGOE. Your long and short haul should apply to the barge line the same as it applies to the rail line?

Mr. HAYES. What is sauce for the goose should be sauce for the gander but the way that is set up threatens discrimination.

Judge IGOE. Isn't the effect of what is being attempted to be done here really the establishment of a minimum below which the barge lines cannot go in charging for their transportation of this grain from its origination up to the point of destination here in Chicago? That, in effect is what it amounts to, and that minimum would agree with the rail rate.

Mr. HAYES. I am not sure I follow your Honor.

Judge IGOE. They have said that the barge lines coming in here will have to pay a penalty if that grain is trans-
253 shipped beyond Chicago toward the east.

Mr. HAYES. Yes, their traffic will bear the penalty.

Judge IGOE. And that penalty agrees with what it has been figured will be the cost of the rail transportation for that same grain from the point of origin up here to Chicago.

Mr. HAYES. No, your Honor; there isn't anything at all in this record about the cost of rail transportation except the fact that you can come into Chicago for a certain rate by rail, yes, that is there; but what is attempted here is to, by increasing the outbound rate, offset the low cost advantage of the inbound transportation which has the effect of taking away from the inbound shipper by barge the advantage of low cost transportation by barge into Chicago.

Judge IGOE. I get that, but I thought when we built this Illinois Waterway the chief point upon which it was sold to the people was that it would provide cheap transportation for articles that could move over that waterway.

Mr. HAYES. YOUR Honor, I thought so, too.

Judge IGOE. Well, that is the way it was sold to the people of Illinois and that is the proposition upon which we have spent $20,000,000 of our money around here for the purpose of con-
structing that canal.

254 Mr. HAYES. And Federal money.

Judge IGOE. If this situation goes into effect, whatever advantage might have been obtained by the people living on that waterway, is completely destroyed, and there is no reason for them to ship over the waterway any more, is there?

Mr. HAYES. They cannot afford to ship over the waterway.

Judge EVANS. We have had all this brought out before, I remember, and the Chief Justice was completely sold on it.

Mr. HAYES. Your Honor, I think the Supreme Court was completely sold.

Judge EVANS. But when we got through we had just wasted our time and your time and we got nowhere. I don't want, if possible, to do the same thing again. Now the same question is presented

with the exception of the completion of the hearing, where before it was not quite completed, but aside from that, I do not see what is the rational effect of that Supreme Court decision other than that our decision enjoining it is wrong and was reversed.

Mr. HAYES. May I read from that decision a little further?

Judge EVANS. There was a lot of talk and a lot of
255 language used, but they reversed us, and our order was to enjoin the order of the Interstate Commerce Commission.

Mr. HAYES. Because it prescribed an 8½-cent penalty.

Judge EVANS. Yes. Now they prescribe a 3-cent penalty, so what is going to be the result when we get through this time?

Mr. HAYES. That is what the Supreme Court held, your Honor, it held not that you were mistaken in enjoying the order that prescribed an 8½-cent penalty but that we were all mistaken, possibly including the Commission, in supposing that the Commission had prescribed or approved any penalty or any rate at all. The court said:

"True, the Commission stated that the railroads 'are justified under Section 1 in treating the ex-barge traffic the same as local or ex-truck traffic' and found that 'the proposed schedules are shown to be just and reasonable.' But this does not constitute a finding that the rates were lawful; they 'may lie within the zone of reasonableness and yet result in undue prejudice' or otherwise violate the Act. The Commission also stated that the facts
256 of record show that 'the proposed schedules cannot be condemned as unlawful under Sections 2 and 3 of the Act.' But this statement followed immediately upon the Commission's statement that from its conclusion that protestants' claim as a matter of right to the existing proportionals was erroneous, 'It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.' Read it the context, we think it meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules 'are not shown to be otherwise unlawful' is, we think, to be similarly read."

What was that erroneous view? The court described it and we are not making that contention.

Judge EVANS. No; your view was just as at present, just as it is now.

Mr. HAYES. No, your Honor.

Judge EVANS. There was no possibility of the carrier
257 that was to carry the grain from Chicago to New York, imposing such an increased rate. Why talk about these other matters? The rate was void.

Mr. HAYES. May I read?

Judge EVANS. It was beyond the power of the Commission to make a rate at the end of any hearing.

Mr. HAYES. I follow your Honor perfectly but may I read what the Supreme Court says was the view that was advanced by those protestants before the Commission, not before you but before the Commission, by which they said they were bound?

This was in the proceedings before the Commission.

"In the proceedings before the Commission the protestants pitched their case upon two propositions"—

and, by the way, I was not a protestant before the Commission when the case was heard.

"—pitched their case upon two propositions: (1) To deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same, no matter where the grain originated; (2) Since denial of that benefit was necessarily unlawful, the Commission was bound to maintain the status quo by
258 cancelling the proposed schedules and thus perpetuating the existing rate structure, whatever might be its defects.

"As the Commission correctly observed with reference to the first contention, 'to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned.'

"Proportional rates so differing and lower than local rates for like out-bound transportation have a long history, antedating the Interstate Commerce Act itself."

And the Court proceeded to defend them. And, as I said earlier to your Honors, I do not make that argument that was held wrong. I have no quarrel with a proportional rate out of Chicago that varies with the length of the actual in-bound haul on grain from St. Louis or grain from Kansas City or grain from Morris, Illinois. That is all right. But where grain comes in from a common origin, from the same point, the same kind of grain and the in-bound haul is just the same and there isn't any difference in the length of the in-bound haul, then to charge more just because it came in by barge than you charge because it came in by
259 rail is in defiance, it seems to me, of the provisions of the statute which says the out-bound carrier shall not discriminate in its rates, fares and charges against the traffic of any connecting carrier, including the carrier by water, expressly so included.

So if you can make a differential just on the fact that it comes in by water, then that would be permission to discriminate against a water carrier because he was a water carrier, and against the terms, the express terms of the statute which include water carriers within the protection against discrimination and against the spirit of it. It seems to me that is common sense. Perhaps I cannot see it fairly.

Judge EVANS. Now, listen to this. It seems to me the opinion of the majority there could not have been much less cloudy, which was most unfortunate for us in the way of instructing us.

"The policy provisions of the Transportation Act, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to 'recognize and preserve the inherent advantages of each'—rail, water, and motor transport. It also seeks 'sound economic conditions' for all kinds of transportation. For
260 more than a year after the enactment of this Act, and until after the Commission had finally disposed of the case, appellees"—

that is the Inland Waterway Company—

"—showed no disposition to make proposals or to develop a record upon the basis of which the Commission might prescribe rates in view of their particular circumstances and under the provisions of the Act designed with reference to them. Instead they relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure. Their nearly four years of litigation have not, however, been in vain, for during all this time they have managed to keep the proposed schedules in abeyance—first by compulsory suspension for the allowable period of seven months at the hands of the Commission, then by the railroads' voluntary act at the expiration of that period, and finally by the compulsion of the district court's injunction.

"Our function does not permit us either to prescribe or approve rates, and our decision carries no implication of approval of any
261 rates here involved. Nor are we at liberty to prescribe, general attitudes the Commission must adopt toward the exercise of discretion left to it rather than to courts. We decide only whether the Commission has acted within the power delegated to it by law. We are of opinion that it has and that the decision of the court below must be reversed."

Mr. HAYES. In other words, they held that they approve what they say the Commission did, which was to refuse to approve an 8½-cent penalty according to them.

Judge EVANS. Well, they also say it seems to me positively, the waterway people relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure. Now, why aren't they entitled to the rate benefits of it?

Mr. HAYES. Perhaps the existing rate structure, your Honor, needs comprehensive revision. I don't know. The point that we are making is that whatever the other sections of the Act may require, it is not possible to observe the statute and enforce the other sections of the Act by means which involve the trampling of section 3, means which involve a trampling on Section 3.

True, those 8½-cent penalties were kept in abeyance.
262 True also, the Commission found that the 8½-cent penalty was wrong on further hearing.

Judge EVANS. We think the injunction should be granted. I do not know how you should indicate them any more than I did the last time, but you may draw your findings and submit them to your opponent. I will ask you to be sure of your position because we want to comply with the statute and the decisions of the Supreme Court and the law of the land. On general principles I would think the parties most interested in this case are the railroad companies and they ought to be specifically notified.

Mr. HAYES. They have, I understand, your Honor informed various members of the Commission staff that they do not have the slightest intention of intervening here, and will not.

Judge EVANS. Lots of times courts get caught, you understand that, but somebody else doesn't understand, and then later they come in and say, "Well, we did not get any notice. We were not parties to the action."

Mr. HAYES. Well, I think I know Frank Cole well enough to say he will never claim before your Honor that he was sound asleep while this train of cars went by.

Mr. WALTER. At the hearing on October 15th, if he is interested he can come.

263 Judge IGOE. This is set for the merits for October 15th, isn't it?

Mr. WALTER. Yes, it is.

Judge EVANS. Is this the original copy of the order?

Mr. HAYES. There is the original and there are two copies that have been handed to your Honor.

Judge EVANS. They want you to sign the copies; you sign the copies.

(Which were all the proceedings had on the hearing of the above-entitled matter.)

264 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 45–C–865 Consolidated

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

CERTIFICATE

I hereby certify that the above and foregoing is a true, full, and accurate transcript of my original shorthand notes taken upon the hearing of the above-entitled matter.

THOMAS M. RYAN,
Official Court Reporter, United States District Court, Northern District of Illinois, Eastern Division.

264–1 *Plaintiff's Exhibit A*

Subject, except as otherwise provided herein, to Tariff of Increased Rates and Charges No. X–148, Agent B. T. Jones' I. C. C. No. 3659, M. F.-I. C. C. No. 85, C. T. C. No. 1801, Ohio No. 2015, Pa. P. U. C. No. 284, P. S. C. W. Va. No. 257, supplements thereto or successive issues thereof. See note below.

The operation of portions of tariff, as amended, referred to in Supplement 67, is suspended as provided in said supplement.

SUPPLEMENT NO. 133

To C. T. C. No. 1651, Ohio No. 1870, Pa. P. U. C. No. 249, P. S. C. W. Va. No. 232, I. C. C. No. 3356, M. F.-I. C. C. No. 34

Supplements Nos. ①67, ②69, ⑤75, ⑤76, ③96, 101, ⑥124, ④125, 131 and 133 contain all changes from the original tariff.

Supplement No. 128 (Suspension Notice—I. & S. Docket No. 5334—Routing Grain). Supplement No. 132 (Cancellation Notice in I. & S. Docket No. 4718—Ex-Barge Traffic). (Portions of Supplements Nos. 126 and 127 under supension in I. & S. Docket No. 5334—Routing Grain).

CENTRAL FREIGHT ASSOCIATION TARIFF BUREAU

B. T. Jones, Agent

Supplement No. 133 to Freight Tariff No. 245-G, Supplements referred to above contain all changes, Local, Joint and Proportional Rates applying on Grain, Grain Products and Byproducts of grain and other commodities as named on page 9 of tariff.

From stations in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, Ohio, Pennsylvania, West Virginia, Wisconsin, named on pages 10 to 78 of tariff as amended.

To Albany, N. Y., Baltimore, Md., Boston, Mass., New York, N. Y., Philadelphia, Pa., Rochester, N. Y., Syracuse, N. Y., Utica, N. Y., and other Eastern points in the United States named on pages 83, 84, 102 and 103 of tariff as amended.

Also Basis for Rates to United States and Canadian Ports for Export, as Provided in Section 2 of Tariff, as amended. Also Joint Rail-Motor Rates to Points served by the Boston & Maine Transportation Company.

Governed, except as otherwise provided herein, by Official Classification I. C. C.-O. C. No. 60, M. F.-I. C. C. No. 7, C. T. C.-O. C. No. 60, Ohio-O. C. No. 60, P. S. C.-Pa.-O. C. No. 60, P. S. C.-W. Va.-O. C. No. 60, A. H. Greenly, Agent, and by exceptions thereto, as indicated in Item 345 of tariff.

Issued June 1, 1945. Effective October 5, 1945 except as otherwise provided herein.

NOTICE

This supplement contains rates referred to in Item No. 104-D (Fourth Section Application) that are higher for shorter than for longer distances over the same route.

Authority to depart from the terms of Rule 9 (e) of Tariff Circular No. 20, granted by permission of the Interstate Commerce Commission No. 7920 of March 17, 1942.

Issued in conformity with findings of the Interstate Commerce Commission in I. & S. Docket No. 4718 decided February 13, 1945.

①Special Supplement—I. C. C. Service Order No. 68.

②Special Supplement—Ex Parte 148.

③Special Supplement—Suspension Notice (Ex Parte 148 Reopened).

④Special Supplement—Postponement Notice (Ex Parte 148 Reopened).

⑤Under suspension and postponement as provided by Supplements 96 and 125.

⑥Special Supplement—Amendment 6 to I. C. C. Service Order No. 68.

NOTE.—The operation of the provisions referring to this Note as to rates or charges published in this supplement is suspended on the effective dates of such rates or charges until January 1, 1946, except as otherwise provided in Item R-148, and will become operative January 1, 1946. The form of this publication is authorized by permission of the Interstate Commerce Commission, No. 15585 as amended December 12, 1944.

Issued by B. T. Jones, Agent, 608 So. Dearborn St., Chicago 5, Ill.

264-2 *Individual Carrier's Tariff Numbers*

Carrier	Number
Alton R. R.	F-2141-H
Atlantic Coast Line R. R.	F. T. 16-245-G
Baltimore and Ohio R. R.	Agency 1506-G
Chesapeake and Ohio Ry.	725-H
Chicago & Eastern Illinois R. R.	2300-E
Chicago, Attica & Southern R. R.	279-C
Clinchfield R. R.	F. L. 5630
Columbus and Greenville Ry.	1374-E
Detroit and Mackinac Ry.	G. F. D. 837-G
Detroit and Toledo Shore Line R. R.	369-D
Durham & Southern Ry.	G. F. O. Box 64
Erie R. R. (Lines West)	770-G
Grand Trunk Western R. R.	G. T. W. 750-G
Gulf, Mobile and Ohio R. R.	G. F. O. 4542
Illinois Central R. R.	13849-H
Illinois Terminal R. R.	555-G
Louisville and Nashville R. R.	G. F. O. 381-G Auth. File 308-387
Minneapolis & St. Louis R. R.	2271-H
Missouri-Illinois R. R.	58-G Auth. File F-63
New York, Chicago and St. Louis R. R.	G. F. D. 750-G
Norfolk Southern R. R.	F. L. 78-30
Pennsylvania R. R.	Agent's Index 261
Piedmont & Northern Ry.	G. F. O. Box 64
Southern Ry.—Lines East	S. T. F. 35 M. L. 5712 G. F. O. 2784
Southern Ry.—Lines West	G. F. O. 18

NOTE BB.—Rates referring to this Note will expire six months after the termination of the present war, unless sooner modified or terminated in further proceedings in I. C. C. Ex Parte 148 or other proceedings. During the effectiveness of rates referring to this note, all other reshipping or proportional rates in this tariff as amended on the same articles from and to the same points and via the same routes are inapplicable. The rates subject to Note BB are hereby suspended until January 1, 1946, and will become operative on January 1, 1946.

PARTICIPATING CARRIERS

Carriers Parties to Tariff and Effective Supplements are as Shown in Tariff, and Supplements Nos. 101 and 131

ALPHABETICAL LIST OF STATIONS FROM WHICH RATES APPLY AND RATE GROUPS IN WHICH LOCATED

Amend alphabetical list of stations from which rates apply, pages 11 to 20 of tariff, of the following stations on carriers indicated, to read as follows:

Station Nos.	Station	Carriers	Rate group No.
30	Argo, Ill.:		
	Proper	Alton	(S)100-R, (S)117.
	Proportional:		
	See Note 20	Alton	(S)(S)100-A.
	See Note 24	Alton	(S)(S)100-AA.
26	Argo, Ill.:		
	Proper	BRofC	100.
	Proportional:		
	See Note 20	BRofC	(S)100-A.
	See Note 24	BRofC	(S)100-AA.
80	Argo, Ill.:		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	(S)100-A.
	See Note 24	IHB	(S)100-AA.
24765	Berger, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	(S)100-A.
	See Note 24	PRR	(S)100-AA.
80	Blue Island, Ill.:		
	Proper	B&OCT	(S)100.
	Proportional:		
	See Note 20	B&OCT	(S)(S)100-A.
	See Note 24	B&OCT	(S)(S)100-AA.
40	(119) Blue Island, Ill.:		
	Proper	GT-W	(S)100.
	Proportional:		
	See Note 20	GT-W	(S)(S)100-A.
	See Note 24	GT-W	(S)(S)100-AA.
60	Blue Island, Ill.:		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	(S)100-A.
	See Note 24	IHB	(S)100-AA.
11012a	Blue Island, Ill.:		
	Proper	NYC(M)	(S)100.
	Proportional:		
	See Note 20	NYC(M)	(S)(S)100-A.
	See Note 24	NYC(M)	(S)(S)100-AA.
12325	Brookdale, Ill.:		
	Proper	B&O	(S)100.
	Proportional:		
	See Note 20	B&O	(S)(S)100-A.
	See Note 24	B&O	(S)(S)100-AA.
15	Burnham, Ill.:		
	Proper	CSS&SB	(S)100.
	Proportional:		
	See Note 20	CSS&SB	(S)(S)100-A.
	See Note 24	CSS&SB	(S)(S)100-AA.
250	Burnham, Ill.:		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	(S)100-A.
	See Note 24	IHB	(S)100-AA.
675	Burnham, Ill.:		
	Proper	NYC&StL	(S)100.
	Proportional:		
	See Note 20	NYC&StL	(S)(S)100-A.
	See Note 24	NYC&StL	(S)(S)100-AA.

Footnotes at end of table.

Station Nos.	Station	Carriers	Rate Group No.
20805	Burnham, Ill.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
20765	Calumet, Ind.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
40	Calumet City, Ill.:		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	@100-A.
	See Note 24	IHB	@100-AA.
11013	Calumet Park, Ill.:		
	Proper	NYC(M)	@100.
	Proportional:		
	See Note 20	NYC(M)	@@100-A.
	See Note 24	NYC(M)	@@100-AA.
30810	Calumet Park, Ill.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
12000	@@Chicago, Ill.:		
	Proper	B&O	100.
	Proportional:		
	@See Note 20	B&O	100-A.
	See Note 24	B&O	100-AA.

@See also page 136 of tariff.
For explanation of Notes, see pages 85 to 101 of tariff, as amended.
For explanation of other reference marks, see pages 79 to 82 of tariff, as amended.

264–3 Amend alphabetical list of stations from which rates apply, pages 20 to 26 of tariff, as amended on page 5 of Supplement No. 101 and page 4 of Supplement No. 131, of the following stations on carriers indicated, to read as follows:

Station Nos.	Station	Carriers	Rate Group No. (except as noted)
9180	@@Chicago, Ill.:		
	Proper	C&O	100.
	Proportional:		
	See Note 20	C&O	100-A
	See Note 24	C&O	100-AA.
260	Chicago, Ill.:		
	Proper	C&EI	@100-J, @100-L, @@110.
	Proportional:		
	See Note 20	C&EI	@100-A.
	See Note 24	C&EI	@100-AA.
4925	@@Chicago, Ill.:		
	Proper	Erie	100.
	Proportional:		
	See Note 20	Erie	100-A.
	See Note 24	Erie	100-AA.
5	Chicago, Ill.:		
	See Notes 20 and 24.	C&NW	Pages 136 and 179 of tariff as amended.
5	@@Chicago, Ill.:		
	Proper	CI&L	100.
	Proportional:		
	@See Note 20	CI&L	100-A.
	See Note 24	CI&L	100-AA.

Footnotes at end of table.

Station Nos.	Station	Carriers	Rate Group No. (except as noted)
5	Chicago, Ill.:		
	Proper	CMSP&P	100.
	Proportional:		
	See Note 20	CMSP&P	100-A.
	See Note 24	CMSP&P	100-AA.
5	Chicago, Ill.:		
	Proper	CSS&SB	100.
	Proportional:		
	See Note 20	CSS&SB	100-A.
	See Note 24	CSS&SB	100-AA.
5	Chicago, Ill.:		
	Proper	GT-W	100.
	Proportional:		
	See Note 20	GT-W	100-A.
	See Note 24	GT-W	100-AA.
5	Chicago, Ill.:		
	Proper	IC	110, 117.
	Proportional:		
	See Note 20	IC	100-A.
	See Note 24	IC	100-AA.
4935	Chicago, Ill.:		
	Proper	NYC(C)	100.
	Proportional:		
	See Note 20	NYC(C)	100-A.
	See Note 24	NYC(C)	100-AA.
11905	Chicago, Ill.:		
	Proper	NYC(M)	100.
	Proportional:		
	See Note 20	NYC(M)	100-A.
	See Note 24	NYC(M)	100-AA.
5000	Chicago, Ill.:		
	Proper	NYC(W)	100.
	Proportional:		
	See Note 20	NYC(W)	100-A.
	See Note 24	NYC(W)	100-AA.
600	Chicago, Ill.:		
	Proper	NYC&StL	100.
	Proportional:		
	See Note 20	NYC&StL	100-A.
	See Note 24	NYC&StL	100-AA.
2030	Chicago, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	100-A.
	See Note 24	PRR	100-AA.
5	Chicago, Ill.:		
	Proper	PM	100.
	Proportional:		
	See Note 20	PM	100-A.
	See Note 24	PM	100-AA.
620	Chicago, Ill.:		
	Proper	Wab	100.
	Proportional:		
	See Note 20	Wab	100-A.
	See Note 24	Wab	100-AA.
15	Chicago Lawn, Ill.:		
	Proper	GT-W	100.
	Proportional:		
	See Note 20	GT-W	100-A.
	See Note 24	GT-W	100-AA.
2090	Clabarn, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	100-A.
	See Note 24	PRR	100-AA.
85	Dolton, Ill.:		
	Proper	C&EI	100-J, 100-L.
	Proportional:		
	See Note 20	C&EI	100-A.
	See Note 24	C&EI	100-AA.
2070	Dolton, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	100-A.
	See Note 24	PRR	100-AA.

Footnotes at end of table.

Station Nos.	Station	Carriers	Rate Group No. (except as noted)
160	East Chicago, Ind.:		
	Proper	B&OCT	(a)100.
	Proportional:		
	See Note 20	B&OCT	(a)(a)100-A.
	See Note 24	B&OCT	(a)(a)100-AA.
25	East Chicago, Ind.:		
	Proper	CSS&SB	(a)100.
	Proportional:		
	See Note 20	CSS&SB	(a)(a)100-A.
	See Note 24	CSS&SB	(a)(a)100-AA.
7635	East Chicago, Ind.:		
	Proper	NYC(W)	100.
	Proportional:		
	(a)See Note 20	NYC(W)	(a)100-A.
	See Note 24	NYC(W)	(a)100-AA.
20760	East Chicago, Ind.:		
	Proper	PRR	(a)100.
	Proportional:		
	See Note 20	PRR	(a)(a)100-A.
	See Note 24	PRR	(a)(a)100-AA.
595	(166)East Chicago, Ind.:		
	Proper	Wab	100.
	Proportional:		
	See Note 20	Wab	(a)100-A.
	See Note 24	Wab	(a)100-AA.
20725	East Side, Ill.: (Chicago)		
	Proper	PRR	(a)100.
	Proportional:		
	See Note 20	PRR	(a)(a)100-A.
	See Note 24	PRR	(a)(a)100-AA.
10	(119)Elsdon, Ill.:		
	Proper	GT-W	(a)100.
	Proportional:		
	See Note 20	GT-W	(a)(a)100-A.
	See Note 24	GT-W	(a)(a)100-AA.

(a)See also page 135 of tariff.
(a)See also page 136 of tariff.
(119)Applies only in connection with domestic rates on Grain and Grain Products and only on shipments routed via I. C. R. R., Decatur, Ill., and Pennsylvania R. R. to points on the Pennsylvania R. R., or via I. C. R. R., Decatur, Ill., Pennsylvania R. R., Buffalo, N. Y., Pittsburgh, Pa., or Pennsylvania R. R. junctions east thereof to destinations on other railroads.
(170)Applies only on shipments routed via C. & E. I. R. R., Watseka, Ill., T. P. & W. R. R., Peoria, Ill., or C. & E. I. R. R., Hustle, Ill., N. Y. C. & St. L. R. R., Peoria, Ill., thence routing instructions from Peoria, Ill., as per Section 3 of tariff, as amended.
For explanation of Notes, see pages 85 to 101 of tariff, as amended.
For explanation of other reference marks, see pages 79 to 82 of tariff, as amended.

264–4 Amend alphabetical list of stations from which rates apply, pages 30 to 37 of tariff, of the following stations on carriers indicated, to read as follows:

Station Nos.	Station	Carriers	Rate Group No.
55	Englewood, Ill.:		
	Proper	C&EI	(a)100-J, (a)100-L.
	Proportional:		
	See Note 20	C&EI	(a)100-A.
	See Note 24	C&EI	(a)100-AA.
10	Englewood, Ill.:		
	Proper	CI&L	(a)100.
	Proportional:		
	See Note 20	CI&L	(a)100-A.
	See Note 24	CI&L	(a)100-AA.

Footnotes at end of table.

Station Nos.	Station	Carriers	Rate Group No.
4930	Englewood, Ill.:		
	Proper	Erie	(a)100.
	Proportional:		
	See Note 20	Erie	(a)100-A.
	See Note 24	Erie	(a)100-AA.
5005	Englewood, Ill.:		
	Proper	NYC(W)	(a)100.
	Proportional:		
	(2)See Note 20	NYC(W)	(a)(a)100-A.
	See Note 24	NYC(W)	(a)(a)100-AA.
20745	Englewood, Ill.:		
	Proper	PRR	(a)100.
	Proportional:		
	See Note 20	PRR	(a)(a)100-A.
	See Note 24	PRR	(a)(a)100-AA.
615	(166)Englewood, Ill.: (Chicago)		
	Proper	Wab	(a)100.
	Proportional:		
	See Note 20	Wab	(a)100-A.
	See Note 24	Wab	(a)100-AA.
60	Englewood, Ill.: (76th Street)		
	Proper	C&EI	(a)100-J, (a)100-L.
	Proportional:		
	See Note 20	C&EI	(a)100-A.
	See Note 24	C&EI	(a)100-AA.
30	(119)Evergreen Park, Ill.:		
	Proper	GT-W	(a)100.
	Proportional:		
	See Note 20	GT-W	(a)(a)100-A.
	See Note 24	GT-W	(a)(a)100-AA.
70	Fernwood, Ill.:		
	Proper	C&EI	(a)100-J, (a)100-L.
	Proportional:		
	See Note 20	C&EI	(a)100-A.
	See Note 24	C&EI	(a)100-AA.
12010	Forest Hill, Ill.:		
	Proper	B&O	(a)100.
	Proportional:		
	(2)See Note 20	B&O	(a)(a)100-A.
	See Note 24	B&O	(a)(a)100-AA.
617	(166)Forty-seventh St., Ill.: (Chicago)		
	Proper	Wab	100.
	Proportional:		
	See Note 20	Wab	(a)100-A.
	See Note 24	Wab	(a)100-AA.
20	Gibson, Ind.: (Lake Co.)		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	(a)100-A.
	See Note 24	IHB	(a)100-AA.
11016	Gibson, Ind.:		
	Proper	NYC(M)	
	Proportional:		
	See Note 20	NYC(M)	(a)(a)100-A.
	See Note 24	NYC(M)	(a)(a)100-AA.
7643	Gibson, Ind.:		
	Proper	NYC(W)	100.
	Proportional:		
	(2)See Note 20	NYC(W)	(a)100-A.
	See Note 24	NYC(W)	(a)100-AA.
11017	Gibson Transfer, Ind.:		
	Proper	NYC(M)	(a)100.
	Proportional:		
	See Note 20	NYC(M)	(a)(a)100-A.
	See Note 24	NYC(M)	(a)(a)100-AA.

Footnotes at end of table.

Station Nos.	Station	Carriers	Rate Group No.
5145	Gibson Transfer, Ind.:		
	Proper	NYC(W)	100.
	Proportional:		
	@See Note 20	NYC(W)	@100-A.
	See Note 24	NYC(W)	@100-AA.
24760	Globe, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	@100-A.
	See Note 24	PRR	@100-AA.
5020	Grand Crossing, Ill. (Chicago)		
	Proper	NYC(W)	@100.
	Proportional:		
	@See Note 20	NYC(W)	@@100-A.
	See Note 24	NYC(W)	@@100-AA.
20740	Grand Crossing, Ill.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
7640	Grasselli, Ind.:		
	Proper	NYC(W)	100.
	Proportional:		
	@See Note 20	NYC(W)	@100-A.
	See Note 24	NYC(W)	@100-AA.
20770	Grasselli, Ind.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
150	Hammond, Ind.:		
	Proper	B&OCT	@100.
	Proportional:		
	See Note 20	B&OCT	@@100-A.
	See Note 24	B&OCT	@@100-AA.
9175	Hammond, Ind.:		
	Proper	C&O	@100.
	Proportional:		
	See Note 20	C&O	@@100-A.
	See Note 24	C&O	@@100-AA.
30	Hammond, Ind.:		
	Proper	CI&L	@100.
	Proportional:		
	See Note 20	CI&L	@100-A.
	See Note 24	CI&L	@100-AA.
20	Hammond, Ind.:		
	Proper	CSS&SB	@100.
	Proportional:		
	See Note 20	CSS&SB	@@100-A.
	See Note 24	CSS&SB	@@100-AA.
295	Hammond, Ind.:		
	Proper	EJ&E	100.
	Proportional:		
	See Note 20	EJ&E	@100-A.
	See Note 24	EJ&E	@100-AA.

@See also page 136 of tariff.
For explanation of notes, see pages 85 to 101 of tariff, as amended.
For explanation of other reference marks, see pages 79 to 82 of tariff, as amended.

264–5. Amend alphabetical list of stations from which rates apply, pages 37 to 62 of tariff, of the following stations indicated, to read as follows:

Station Nos.	Station	Carriers	Rate Group No.
4910	Hammond, Ind.:		
	Proper	Erie	@100.
	Proportional:		
	See Note 20	Erie	@100-A.
	See Note 24	Erie	@100-AA.
11015	Hammond, Ind.:		
	Proper	NYC(M)	@100.
	Proportional:		
	See Note 20	NYC(M)	@@100-A.
	See Note 24	NYC(M)	@@100-AA.
670	Hammond, Ind.:		
	Proper	NYC&StL	@100.
	Proportional:		
	See Note 20	NYC&StL	@@100-A.
	See Note 24	NYC&StL	@@100-AA.
20780	Hammond, Ind.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
600	(188) Hammond, Ind.: (State Line)		
	Proper	Wab	100.
	Proportional:		
	See Note 20	Wab	@100-A.
	See Note 24	Wab	@100-AA.
85	Harvey, Ill.:		
	Proper	B&OCT	@100.
	Proportional:		
	See Note 20	B&OCT	@@100-A.
	See Note 24	B&OCT	@@100-AA.
45	(110) Harvey, Ill.:		
	Proper	GT-W	@100.
	Proportional:		
	See Note 20	GT-W	@@100-A.
	See Note 24	GT-W	@@100-AA.
25	Hegewisch, Ill.:		
	Proper	CI&L	@100.
	Proportional:		
	See Note 20	CI&L	@100-A.
	See Note 24	CI&L	@100-AA.
10	Hegewisch, Ill.:		
	Proper	CSS&SB	@100.
	Proportional:		
	See Note 20	CSS&SB	@@100-A.
	See Note 24	CSS&SB	@@100-AA.
4915	Hegewisch, Ill.:		
	Proper	Erie	@100.
	Proportional:		
	See Note 20	Erie	@100-A.
	See Note 24	Erie	@100-AA.
20785	Hegewisch, Ill.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
20795	Hutchinson, Ill.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
12030	Indiana Harbor, Ind.:		
	Proper	B&O	@100.
	Proportional:		
	See Note 20	B&O	@@100-A.
	See Note 24	B&O	@@100-AA.

Station Nos.	Station	Carriers	Rate Group No.
5040	Indiana Harbor, Ind.:		
	Proper	NYC(W)	@100.
	Proportional:		
	@See Note 20	NYC(W)	@@100-A.
	See Note 24	NYC(W)	@@100-AA.
20700	Indiana Harbor, Ind.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.
80	Kensington, Ill.:		
	Proper	C&EI	@100-J, @100-L.
	Proportional:		
	See Note 20	C&EI	@100-A.
	See Note 24	C&EI	@100-AA.
11010	Kensington, Ill.:		
	Proper	NYC(M)	@100.
	Proportional:		
	See Note 20	NYC(M)	@@100-A.
	See Note 24	NYC(M)	@@100-AA.
35	(119) Mt. Greenwood, Ill.:		
	Proper	GT-W	@100.
	Proportional:		
	See Note 20	GT-W	@@100-A.
	See Note 24	GT-W	@@100-AA.
140	North Hammond, Ind.:		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	@100-A.
	See Note 24	IHB	@100-AA.
65	Oakdale, Ill.:		
	Proper	C&EI	@100-J, @100-L.
	Proportional:		
	See Note 20	C&EI	@100-A.
	See Note 24	C&EI	@100-AA.
12020	100th St., Ill.:		
	Proper	B&O	@100.
	Proportional:		
	See Note 20	B&O	@@100-A.
	See Note 24	B&O	@@100-AA.
7745	Osborn, Ind.:		
	Proper	NYC(W)	100.
	Proportional:		
	@See Note 20	NYC(W)	@100-A.
	See Note 24	NYC(W)	@100-AA.
665	Osborn, Ind.:		
	Proper	NYC&StL	@100.
	Proportional:		
	See Note 20	NYC&StL	@@100-A.
	See Note 24	NYC&StL	@@100-AA.
15	Pullman Jct., Ill.:		
	Proper	CI&L	@100.
	Proportional:		
	See Note 20	CI&L	@100-A.
	See Note 24	CI&L	@100-AA.
4920	Pullman Jct., Ill.:		
	Proper	Erie	@100.
	Proportional:		
	See Note 20	Erie	@100-A.
	See Note 24	Erie	@100-AA.
20775	Republic, Ind.:		
	Proper	PRR	@100.
	Proportional:		
	See Note 20	PRR	@@100-A.
	See Note 24	PRR	@@100-AA.

@See also page 136 of tariff.
For explanation of Notes, see pages 85 to 101 of tariff, as amended.
For explanation of other reference marks, see pages 79 to 82 of tariff, as amended.

264–6 Amend alphabetical list of stations from which rates apply, pages 63 to 78 of tariff, of the following stations, on carriers indicated, to read as follows:

Station Nos.	Station	Carriers	Rate Group No.
140	Riverdale, Ill.:		
	Proper	B&OCT	⑥100.
	Proportional:		
	See Note 20	B&OCT	⑥⑥100-A.
	See Note 24	B&OCT	⑥⑥100-AA.
24775	Riverdale, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	⑥100-A.
	See Note 24	PRR	⑥100-AA.
20710	Robertsdale, Ind.:		
	Proper	PRR	⑥100.
	Proportional:		
	See Note 20	PRR	⑥⑥100-A.
	See Note 24	PRR	⑥⑥100-AA.
280	Roby, Ind.:		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	⑥100-A.
	See Note 24	IHB	⑥100-AA.
20715	Roby, Ind.:		
	Proper	PRR	⑥100.
	Proportional:		
	See Note 20	PRR	⑥⑥100-A.
	See Note 24	PRR	⑥⑥100-AA.
75	Roseland, Ill.:		
	Proper	C&EI	⑧100-J, ⑧100-L.
	Proportional:		
	See Note 20	C&EI	⑧100-A.
	See Note 24	C&EI	⑧100-AA.
680	Solvay, Ill.:		
	Proper	NYC&StL	⑥100.
	Proportional:		
	See Note 20	NYC&StL	⑥⑥100-A.
	See Note 24	NYC&StL	⑥⑥100-AA.
12320	South Chicago, Ill.:		
	Proper	B&O	⑥100.
	Proportional:		
	See Note 20	B&O	⑥⑥100-A.
	See Note 24	B&O	⑥⑥100-AA.
320	South Chicago, Ill.:		
	Proper	EJ&E	100.
	Proportional:		
	See Note 20	EJ&E	⑥100-A.
	See Note 24	EJ&E	⑥100-AA.
232	South Chicago, Ill.: (E. Side)		
	Proper	IHB	100.
	Proportional:		
	See Note 20	IHB	⑥100-A.
	See Note 24	IHB	⑥100-AA.
5025	South Chicago, Ill.: (Chicago)		
	Proper	NYC(W)	⑥100.
	Proportional:		
	See Note 20	NYC(W)	⑥⑥100-A.
	See Note 24	NYC(W)	⑥⑥100-AA.
20735	South Chicago, Ill.:		
	Proper	PRR	⑥100.
	Proportional:		
	See Note 20	PRR	⑥⑥100-A.
	See Note 24	PRR	⑥⑥100-AA.
305	South Chicago, Ill.: (98th St.)		
	Proper	EJ&E	100.
	Proportional:		
	See Note 20	EJ&E	⑥100-A.
	See Note 24	EJ&E	⑥100-AA.

Footnotes at end of table.

Station Nos.	Station	Carriers	Rate Group No.
20	South Deering, Ill.:		
	Proper	CI&L	ⓐ100.
	Proportional:		
	See Note 20	CI&L	ⓐ100-A.
	See Note 24	CI&L	ⓐ100-AA.
685	Stony Island, Ill.:		
	Proper	NYC&StL	ⓐ100.
	Proportional:		
	See Note 20	NYC&StL	ⓐⓐ100-A.
	See Note 24	NYC&StL	ⓐⓐ100-AA.
24790	Washington Heights, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	ⓐ100-A.
	See Note 24	PRR	ⓐ100-AA.
24782	West Pullman, Ill.:		
	Proper	PRR	100.
	Proportional:		
	See Note 20	PRR	ⓐ100-A.
	See Note 24	PRR	ⓐ100-AA.
12025	Whiting, Ind.:		
	Proper	B&O	ⓐ100.
	Proportional:		
	ⓐSee Note 20	B&O	ⓐⓐ100-A.
	See Note 24	B&O	ⓐⓐ100-AA.
5035	Whiting, Ind.:		
	Proper	NYC(W)	ⓐ100.
	Proportional:		
	ⓐSee Note 20	NYC(W)	ⓐⓐ100-A.
	See Note 24	NYC(W)	ⓐⓐ100-AA.
20705	Whiting, Ind.:		
	Proper	PRR	ⓐ100.
	Proportional:		
	See Note 20	PRR	ⓐⓐ100-A.
	See Note 24	PRR	ⓐⓐ100-AA.
90	Yard Center, Ill.:		
	Proper	C&EI	ⓐ100-J; ⓐ100-L.
	Proportional:		
	See Note 20	C&EI	ⓐ100-A.
	See Note 24	C&EI	ⓐ100-AA.

ⓐSee also page 135 of tariff.
ⓐSee also page 136 of tariff.
For explanation of Notes, see pages 85 to 101 of tariff, as amended.
For explanation of other reference marks, see pages 79 to 82 of tariff, as amended.

264–7 EXPLANATION OF NOTES

Note 20 Cancels 20, page 2 of Supplement 132.

Application of Re-shipping or Proportional Rates from Chicago, Joliet, Kankakee, Milwaukee, Manitowoc, etc.

Where reference is made to this Note, rates apply as re-shipping or proportional rates applicable on traffic reaching the re-shipping point via rail or water transportation line (see Exception 2 below) that can furnish to the out-bound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point, and will only apply on such traffic when originating at points from which no joint through commodity rates are in effect in connection with the in-bound carrier via the re-shipping point from original shipping point to final destina-

tion; provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the local rate from the re-shipping point to destination, the difference necessary to protect the local rates from the re-shipping point to be added to the re-shipping rate therefrom. (See Exception 1 below.)

These rates are applicable on Ex-Lake shipments as of the date such shipments leave the lake port from which the rates subject to this Note are applicable.

The Ex-Lake Grain and (or) Grain Product rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Milwaukee or Manitowoc via lake, also on Grain Products milled from Grain which arrives at these ports via lake. The Ex-Lake rates covered hereby are applicable as of the date shipments leave the respective points named herein.

These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points from which no joint through commodity rates are in effect, not stopped in transit at re-shipping points subject to this application.

Exception 1.—The foregoing provision as to application of the local rates as minima will not apply on shipments of Malt and Malt Sprouts, C. L., originating at Jefferson Junction, Wis.

Exception 2.—The rates subject to the provisions of this Note will not apply from points in Group 100–AA or C&NW Station No. 5 (Chicago, Ill.), on traffic reaching such re-shipping points via river or canal. (See Note 24 below.)

Amend page 90 of tariff, by the addition of the following:

Note 24 (New).

Application of Re-shipping or Proportional Rates from Points in Group 100–AA and C&NW Station No. 5 (Chicago, Ill.), Ex-river or Canal.

Where reference is made to this Note, rates will apply as follows:

Rates subject to the provisions of this Note are re-shipping or proportional rates applicable only on traffic reaching the reshipping point via a river or canal transportation line that can furnish to the out-bound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point, and will only apply on such traffic when originating at points beyond the re-shipping point. These rates are applicable as of the

date of reshipment from the re-shipping point from which the rates subject to this Note are applicable. Exception.—Such rates will not apply on ex-lake traffic, viz.: traffic reaching the re-shipping point via a lake carrier vessel.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

These rates also apply on shipments originating at points beyond the re-shipping point, not stopped in transit at re-shipping point subject to this application and are applicable as of the date of re-shipment from the re-shipping point, from which the rates subject to this Note are applicable.

GENERAL APPLICATION OF RATES

Item No. 104–D Cancels Item No. 104–C.

Fourth Section Application

Fourth Section Application, C. F. A. No. 1080. Dated May 31, 1945. In connection with Grain, Grain Products and Grain By-Products, (Ex-River and Canal).

SECTION 1 (DOMESTIC RATES)

Amend domestic rates on Grain, page 121 of tariff, by the addition of the following:

DOMESTIC RATES ON GRAIN, C. L.

For List of Commodities Taking Grain Rates, also Minimum Weights, see Note 5, page 85 of tariff, as amended

From stations named on pages 10 to 78 of tariff, as amended	To— Albany, N. Y.	Baltimore, Md.	Bellington, W. Va.	Boston, Mass.	Cumberland, Md.	Hagerstown, Md. (Via N. & W. Ry.)	New York, N. Y.	Newport News, Va. Norfolk, Va.	Philadelphia, Pa.	Rochester, N. Y.	Rockland, Me.	Strasburg, Va.	Syracuse, N. Y.	Utica, N. Y.
	Subject to application of rates, items Nos. 5 to 117 of tariff, as amended ◆Rates in Cents per 100 Pounds													
In Rate Group No.														
°100-AA	28	26	25	31	25	26	29	26	27	26	31	26	26	26½
ⓒ100-AA (See Note BB, page 2 herein)	29½	27½	26½	32½	26½	27½	30½	27½	28½	27½	32½	27½	27½	28

◆Increase.

ⓒNot subject to Tariff of Increased Rates and Charges No. X-148, Agent B. T. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.

264–8 SECTION 1 (DOMESTIC RATES)

Amend domestic rates on Grain Products, page 124 of tariff, by the addition of the following:

DOMESTIC RATES ON GRAIN PRODUCTS, C. L.

For List of Commodities Taking Grain Products Rates, also Minimum Weights, see Notes 6 to 14, pages 85 to 87 of tariff, as amended.

From stations named on pages 10 to 78 of tariff, as amended	To— Albany, N. Y.	Baltimore, Md.	Belington, W. Va.	Boston, Mass.	Cumberland, Md.	Hagerstown, Md. (via N. & W. Ry.)	New York, N. Y.	Newport News, Va. Norfolk, Va.	Philadelphia, Pa.	Rochester, N. Y.	Rockland, Me.	Strasburg, Va.	Syracuse, N. Y.	Utica, N. Y.
	Subject to application of rates, items Nos. 5 to 117 of tariff, as amended—♦Rates in Cents per 100 Pounds													
In Rate Group No.														
100-AA	28½	26½	25½	31½	25½	26½	29½	26½	27½	26½	31½	26½	26½	27
©100-AA (See Note BB, page 2 herein)	30	28	27	33	27	28	31	28	29	28	33	28	28	28½

Amend domestic rates as shown on page 127 of tariff, by the addition of the following:

DOMESTIC RATES ON BY-PRODUCTS OF GRAIN, C. L.

For List of Commodities Taking By-Products of Grain Rates, also Minimum Weights, see Note 15 of tariff, as amended

From stations named on pages 10 to 78 of tariff, as amended	To— Albany, N. Y.	Baltimore, Md.	Belington, W. Va.	Boston, Mass.	Cumberland, Md.	Hagerstown, Md. (via N. & W. Ry.)	New York, N. Y.	Newport News, Va. Norfolk, Va.	Philadelphia, Pa.	Rochester, N. Y.	Rockland, Me.	Strasburg, Va.	Syracuse, N. Y.	Utica, N. Y.
	Subject to application of rates, items Nos. 5 to 117 of tariff, as amended—♦Rates in Cents per 100 Pounds													
In Rate Group No.														
100-AA	28½	26½	25½	31½	25½	26½	29½	26½	27½	26½	31½	26½	26½	27
©100-AA (See Note BB, page 2 herein)	30	28	27	33	27	28	31	28	29	28	33	28	28	28½

♦Increase.

©Not subject to tariff of increased rates and charges No. X-148, Agent T. B. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.

Amend domestic rates on the following commodities, as shown on page 132 of tariff, by the addition of the following:

LOCAL AND RESHIPPING OR PROPORTIONAL RATES ON

Dextrine, dry, C. L., minimum weight 40,000 pounds, subject to Notes J, K, N, and R.

Flakes, bakers' or brewers' (made from starch).

Grits, brewers' refined (made from starch).

C. L., minimum weight 40,000 pounds subject to Notes J, K, N, and R.

Starch, noibn in Official Classification.

Starch, liquid, in fibre drums or in metal cans completely jacketed.

Starch substitutes, inedible, consisting of a physical mixture of starch made from grain or flour made from grain and chemical constituents, the chemical content not to exceed 2 percent, in bags, barrels, boxes or pails, or in packages 41 or 54 as defined in the Official Classification.

C. L., minimum weight 40,000 pounds, subject to Notes J, K, N, and R.

From—	To—													
Note.—Applies from the following points named on pages 16 to 78 of tariff, as amended, only when in connection with such points specific reference is made hereto.	Albany, N. Y.	Baltimore, Md.	Bellington, W. Va.	Boston, Mass.	Cumberland, Md.	Hagerstown, Md. (via N. & W. Ry.)	New York, N. Y.	Newport News, Va. Norfolk, Va.	Philadelphia, Pa.	Rochester, N. Y.	Rockland, Me.	Strasburg, Va.	Syracuse, N. Y.	Utica, N. Y.
	Subject to application of rates, items Nos. 5 to 117 of tariff, as amended—♦Rates in Cents per 100 Pounds													
Stations in Rate Group 100-AA	28½	26½	25½	31½	25½	26½	29½	26½	27½	26½	31½	26½	26½	27
⊙Stations in Rate Group 900-AA See Note BB, page 2 herein.	30	28	27	33	27	28	31	28	29	28	33	28	28	28½

♦Increase.

⊙Not subject to Tariff of Increased Rates and Charges No. X-148, Agent B. T. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.

For explanation of other Notes, see pages 85 to 101 of tariff, as amended.

264–9 SECTION 1 (DOMESTIC RATES)

Amend domestic rates, page 136 of tariff, by the addition of the following:

Section No.	From—	Commodity	To—								
			Albany, N. Y.	Baltimore, Md.	Boston, Mass.	New York, N. Y.	Philadelphia, Pa.	Rochester, N. Y.	Rockland, Me.	Syracuse, N. Y.	Utica, N. Y.
			Subject to application of rates, Items Nos. 5 to 117 of tariff, as amended— ♦Rates in cents per 100 pounds								
	C. & N. W. Ry.										
5	Chicago, Ill. (See notes 24 and 135 of tariff, as amended).	Barley, corn, oats, rye, grain screenings, and wheat, in straight or mixed carloads, minimum weight: marked capacity of car, in bulk; in packages, 40,000 lbs.; except on oats, ear corn, snapped corn or corn in the shuck, minimum weight 80 percent of marked capacity of car in bulk; in packages, 40,000 lbs. (subject to notes A, B, C, D, E, F, I, J, K and R).	28 (x/c) 29½	26 (x/c) 27½	31 (x/c) 32½	29 (x/c) 30½	27 (x/c) 28½	26 (x/c) 27½	31 (x/c) 32½	26 (x/c) 27½	26½ (x/c) 28

♦Increase.
x Not subject to tariff of increased rates and charges No. X-148, Agent B. T. Jones' I. C. C. No. 2659, supplements thereto or successive issues thereof.
c See note BB, page 2 herein.

SECTION 2 (EXPORT RATES)

Amend export rates on grain, C. L., page 162 of tariff, by the addition of the following:

EXPORT RATES ON GRAIN, C. L.

List of Commodities Taking Grain Rates, also Minimum Weights. See Note 5, Page 85 of Tariff, as Amended

From stations named on pages 19 to 78 of tariff, as amended	Application (see note, page 168 of tariff, as amended)	To— Baltimore, Md. Column A	Baltimore, Md. Column B	Baltimore, Md. Column C	Boston, Mass., East Boston, Mass. Column A	Boston, Mass., East Boston, Mass. Column B	Boston, Mass., East Boston, Mass. Column C	Halifax, N. S. Column 1	Halifax, N. S. Column 2	Levis, Que.	Montreal, Que.	(290) New London, Conn. (via C. Vt. Ry.)	Newport News, Va.
		Subject to application of rates, items Nos. 5 to 117 and 450 to 540 of tariff, as amended— ◆Rates in cents per 100 pounds											
In rate group No.													
100-AA	2	25	(28)21½	20	26½	(28)23	21½	26½	37½	26½	25½	26½	28
(6)100-AA (see note BB, page 2 herein)	2	26	(28)22	20½	27½	(28)23½	22	27½	28½	27½	26½	27½	28

◆Increase.
(6)Not subject to tariff of increased rates and charges No. X-148, Agent T. B. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.
(28)Proportional or reshipping rates will not apply from stations on or via the I. C. R. R.
(290)Applies only on shipments of grain in sacks.
Column A } For explanation, see page 168 of tariff, as amended.
Column B }
Column C }
Column 1.—Rates will not apply from stations on or via the B. & O. R. R.
Column 2.—Rates apply only from stations on or via the B. & O. R. R.
For explanation of other notes, see pages 85 to 101 of tariff, as amended.

26K 10 Amend export rates on grain, C. L., page 163 of tariff, by the addition of the following:

From stations named on pages 10 to 78 of tariff, as amended	Application (see note, page 168 of tariff, as amended)	To— New York, N. Y. Column A	New York, N. Y. Column B	New York, N. Y. Column C	Norfolk, Va. Column A	Norfolk, Va. Column B	Norfolk, Va. Column C	Philadelphia, Pa. Column A	Philadelphia, Pa. Column B	Philadelphia, Pa. Column C	Portland, Me. Column A	Portland, Me. Column B	Portland, Me. Column C	Quebec, Que.	Saint John, N. B.	West Saint John, N. B.
		Subject to application of rules, items Nos. 5 to 117 and 450 to 540 of tariff, as amended. ◆Rates in cents per 100 pounds														
In rate group No.																
100-AA	2	26½	{(8) 23}	21½	25	{(8) 21½}	20	25½	{(8) 22}	20½	26½	{(8) 23}	21½	26½	26½	26½
⑤100-AA (See note BB, page 2 herein)	2	27½	{(8) 23½}	22	26	{(8) 22}	20½	26½	{(8) 22½}	21	27½	{(8) 23½}	22	27½	27½	27½

◆Increase.
⑤Not subject to tariff of increased rates and charges No. X-148, Agent T. B. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.
(8)Proportional or reshipping rates will not apply from stations on or via the I. C. R. R.
Column A, Column B, Column C } For explanation, see page 168 of tariff, as amended.

Amend export rates on grain products, C. L., page 169 of tariff, by the addition of the following:

EXPORT RATES ON GRAIN PRODUCTS, C. L.

For List of Commodities Taking Grain Products Rates, Also Minimum Weights, See Notes 6 to 14, Pages 85 to 87 of Tariff, as Amended

From stations named on pages 70 to 78 of tariff, as amended	To— Baltimore, Md.	Boston, Mass., East Boston, Mass.	Halifax, N. S. Column 1	Halifax, N. S. Column 2	Levis, Que.	Montreal, Que.	New London, Conn. (via C. Vt. Ry.)	Newport News, Va.	New York, N. Y.	Norfolk, Va.	Philadelphia, Pa.	Portland, Me.	Quebec, Que.	Saint John, N. B.	West Saint John, N. B.
In rate group No.	Subject to application of rates, items Nos. 5 to 117 and 450 to 549 of tariff, as amended—♦Rates in cents per 100 pounds														
100-AA	26	29	29	30	29	27	29	26	29	26	27	29	29	29	29
(c)100-AA (See note-BB, page 2 herein)	27	30	30	31	30	28	30	27	30	27	28	30	30	30	30

♦Increase.

(c)Not subject to tariff of increased rates and charges No. X-148, Agent B. T. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.

Column 1.—Rates will not apply from stations on or via the B. & O. R. R.

Column 2.—Rates apply only from stations on or via the B. & O. R. R.

264 11 Amend page 172 of tariff, by the addition of the following:

EXPORT RATES ON BY-PRODUCTS OF GRAIN, C. L.

For List of Commodities Taking By-Products of Grain Rates, Also Minimum Weights, See Note 15, Page 87 of Tariff, as Amended

From stations named on pages 10 to 78 of tariff, as amended	To— Baltimore, Md.	Boston, Mass., East Boston, Mass.	Halifax, N. S. Column 1	Halifax, N. S. Column 2	Levis, Que.	Montreal, Que.	New London, Conn. (via C. Vt. Ry.)	Newport News, Va.	New York, N. Y.	Norfolk, Va.	Philadelphia, Pa.	Portland, Me.	Quebec, Que.	Saint John, N. B.	West Saint John, N. B.
Subject to application of rates, items Nos. 5 to 177 and 450 to 549 of tariff, as amended— ◆Rates in cents per 100 pounds.															
In rate group No.															
100-AA	26	29	29	30	29	27	29	26	29	26	27	29	29	29	29
⑤100-AA (See Note B, page 2, herein)	27	30	30	31	30	28	30	27	30	27	28	30	30	30	30

◆Increase.
⑤Not subject to tariff of increased rates and charges No. X-148, Agent T. B. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.
Column 1.—Rates will not apply from stations on or via the B. & O. R. R.
Column 2.—Rates apply only from stations on or via the B. & O. R. R.

Amend export rates on flour, C. L., page 173 of tariff, by the addition of the following:

EXPORT RATES ON FLOUR, C. L.

Minimum weight for cars of greater marked capacity than 60,000 pounds, 56,000 pounds; 60,000 pounds capacity or less, 85 percent of the marked capacity but not less than 40,000 pounds (subject to notes G and R, page 89 of tariff, as amended).

From stations named on pages 10 to 78 of tariff, as amended	To—															
	Baltimore, Md.	Boston, Mass. East Boston, Mass.	Halifax, N. S. Column 1	Halifax, N. S. Column 2	Levis, Que.	Montreal, Que.	New London, Conn. (via C. Vt. Ry.)	Newport News, Va.	New York, N. Y.	Norfolk, Va.	Philadelphia, Pa.	Portland, Me.	Quebec, Que.	Saint John, N. B.	West Saint John, N. B.
	Subject to application of rates, items Nos. 5 to 117 and 450 to 540 of tariff, as amended—♦Rates in cents per 100 pounds														
In rate group No.															
100-AA	26	28	28	29	28	27	28	26	28	26	27	28	28	28	28
⊙100-AA (See Note BB, page 2, herein)	27	29	29	30	29	28	29	27	29	27	28	29	29	29	29

♦Increase.
⊙Not subject to Tariff of Increased Rates and Charges No. X-148, Agent R. T. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.
Column 1.—Rates will not apply from stations on or via the B. & O. R. R.
Column 2.—Rates apply only from stations on or via the B. & O. R. R.

264-12 Amend export rates, page 179 of tariff, by the addition of the following:

Station No.	From—	Commodities	To— Baltimore, Md.	Boston, Mass.	Halifax, N. S. Column 1	Halifax, N. S. Column 2	Levis, Que.	Montreal, Que.	New York, N. Y.	Philadelphia, Pa.	Portland, Me.	Quebec, Que.	Saint John, N. B.
			Subject to Application of Rates, Items Nos. 5 to 117 and 450 to 540 of tariff, as amended										
			♦Rates in cents per 100 pounds										
	C. & N. W. Ry.												
5	Chicago, Ill. (See Notes 24 and 135)	Barley, corn, oats, rye, grain screenings, and wheat, in straight or mixed carloads, minimum weight: in bulk, marked capacity of car; in packages, 40,000 lbs.; except on oats, ear corn, snapped corn, corn in the shuck, minimum weight: in bulk, 80 percent of marked capacity of car; in packages, 40,000 lbs. (Subject to Notes A, B, C, D, E, F, I, J, K, and R.)	25	26½	26½	27½	26½	25½	26½	25½	26½	26½	26½
			⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥	⑤⑥
			26	27½	27½	28½	27½	26½	27½	26½	27½	27½	27½

♦Increase.
⑤Not subject to Tariff of Increased Rates and charges No. X-148, agent B. T. Jones' I. C. C. No. 3659, supplements thereto or successive issues thereof.
⑥See Note BB, page 2 herein.
Column 1.—Rates will not apply from stations on or via the B. & O. R. R.
Column 2.—Rates apply only from stations on or via the B. & O. R. R.
For explanation of other Notes, see pages 85 to 101 of tariff, as amended.

264-13 *Plaintiff's Exhibit A-1*

Subject, except as otherwise provided herein, to Tariff of Increased Rates and Charges No. X-148, Agent B. T. Jones' I. C. C. No. 3659, C. T. C. No. 1801, Ind. R. C. No. D-693, M. P. S. C. No. 133, Agent L. E. Kipp's I. C. C. No. A-3386, supplements thereto or successive issues thereof. SEE NOTE BELOW.

SUPPLEMENT NO. 27

To C. T. C. No. 1790, Ind. R. C. No. D-687, M. P. S. C. No. 629, I. C. C. No. 3623, B. T. Jones, Agent; I. C. C. No. A-3375, L. E. Kipp, Agent.

Supplements Nos. ①4, 5, ②6, 15, ③18, 24, 25, 26 and 27 contain all changes from the original tariff.

CENTRAL FREIGHT ASSOCIATION TARIFF BUREAU

B. T. Jones, Agent

Supplement No. 27 to Freight Tariff No. 535-B, Supplements referred to above contain all changes, proportional rates applying on grain, grain products, and grain by-products.

CARLOADS

From Cairo, Ill., Chicago, Ill., East Joliet, Ill., East Ft. Madison, Ill., East Hannibal, Ill., East Keokuk Ill., East St. Louis, Ill., Gale, Ill., Kankakee, Ill., Kewaunee, Wis., Mackinaw City, Mich., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., Michigan City, Ind., Milwaukee, Wis., Peoria, Ill., Quincy, Ill., St. Louis, Mo., Thebes, Ill. and other points named on pages 7 to 10 of tariff as amended and Upper Mississippi River Crossings named in Note 70, page 89 of tariff, as amended.

To stations in Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, West Virginia named on pages 11 to 69 of tariff, as amended.

Governed, except as otherwise provided herein by Official Classification No. 60, I. C. C.-O. C. No. 60, A. H. Greenly, Agent; by exceptions thereto, C. F. A. T. B. Freight Tariff No. 130-C, I C. C. No. 3926, issued by B. T. Jones, Agent, and by supplements thereto or successive issues of said publications.

Issued June 1, 1945. Effective October 5, 1945.

NOTICE

This supplement contains rates referred to in Item No. 553 herein (Fourth Section Application) that are higher for shorter than for longer distances over the same route.

Authority to depart from the terms of Rule 9 (e) of Tariff Circular No. 20, granted by permission of the Interstate Commerce Commission No. 7920 of March 17, 1942.

NOTE.—The operation of the provisions referring to this Note as to rates or charges published in this supplement is suspended until January 1, 1946, and will become operative January 1, 1946.

The form of this publication is authorized by permission of the Interstate Commerce Commission No. 15585 as amended December 12, 1944.

①Special Supplement Ex Parte 148.

②Under suspension and postponement as provided by paragraph (b), page 2 of Supplement No. 18.

③Special Supplement—Postponement Notice—Ex Parte 148 (Reopened).

L. E. Kipp, Agent, 516 W. Jackson Blvd., Chicago 6, Ill. Issued by B. T. Jones, Agent, 608 S. Dearborn St., Chicago 5, Ill.

264-14 *Individual Carriers' Tariff Numbers*

Carrier	Number
Alton R. R.	F-2259-C.
Baltimore and Ohio R. R. (W.)	2018-B.
Chesapeake and Ohio Ry	2459-C.
Chicago & Eastern Illinois R. R.	4385-B.
Gulf Mobile and Ohio R. R.	G. F. O. 4890.
Illinois Central R. R.	18239-C.
Illinois Terminal Co.	3102-B.
Louisville and Nashville R. R.	G. F. O. 3001-C, Auth. File 308-816, 2343-C.
Minneapolis and St. Louis Ry.	G. F. D. 1920-B.
New York, Chicago and St. Louis R. R.	Agent's Index 281.
Pennsylvania R. R. (West)	S. T. F. 35, M. L. 7976, G. F. O. 2784-A
Southern Ry. (East)	G. F. O. 326, S. T. F. 35.
Southern Ry. (West)	

PARTICIPATING CARRIERS

Carriers Parties to Tariff and Effective Supplements are as Shown in Tariff and Supplements Nos. 5, 15 and 25

Explanation of Notes

Amend page 75 of tariff by the addition of the following:

Note 19 (New).

Application of Reshipping or Proportional Rates From Points in the Chicago Switching District, Ex-River or Canal

Where reference is made to this Note rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable only on traffic reaching the reshipping point via a river or canal transportation line that can furnish to the out-bound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points beyond the reshipping point. These rates are applicable as of the

date of reshipment from the reshipping point from which the rates subject to this note are applicable.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission. Exception.—Such rates will not apply on ex-lake traffic, viz: traffic reaching the reshipping point via a lake carrier vessel.

These rates also apply on shipments originating at points beyond the reshipping point, not stopped in transit at reshipping point subject to this application, as of the date of reshipment from the reshipping point from which the rates subject to this Note are applicable.

Note 20 Cancels Note 20, page 75 of tariff.

Application of Reshipping or Proportional Rates on Traffic Originating in Trans-Mississippi River Territory

Where reference is made to this Note, rates will apply as follows:

Rates subject to the provision of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line (See Exception 2 below) that can furnish to the out-bound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point; and will only apply on such traffic when originating at points in Trans-Mississippi River Territory (as described in Note 22, pages 76 and 77 of tariff); provided, that in no case shall the combination through rates to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rates from the reshipping point to be added to the reshipping or proportional rates therefrom.

These rates are subject to transit rules and regulations publisl. in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in Note 22, pages 76 and 77 of tariff, not stopped in transit at reshipping points subject to this application.

Exception 1.—Rates will not apply from Peoria, Ill., and points taking same rates on traffic subject to Note 50, page 87 of tariff.

Exception 2.—The rates subject to the provisions of this Note will not apply from points in the Chicago Switching District as defined in Freight Tariff No. 20-X, Agent R. G. Raasch's I. C. C. No. 584, or E. J. & E. stations: Hammond, Ind.; South Chicago, Ill., and South Chicago (98th Street), Ill., on traffic reaching such reshipping points via river or canal. See Note 19, above.

Note 40 Cancels Note 40, pages 83 and 84 of tariff.

Application of Reshipping or Proportional Rates on Traffic Originating in Northwest Territory

Where reference is made to this Note, rates apply as reshipping or proportional rates on:

Traffic reaching the reshipping point via a rail or water transportation line (See Exception below) that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point and will only apply on such traffic when originating at points in Northwest Territory as described below; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rates from the reshipping point to be added to the reshipping or proportional rate therefrom.

(a) Points in Arizona, except points in Trans-Mississippi River territory as described in Note 22, pages 76 and 77 of tariff, as amended.

(b) Points in California.

(c) Points in Nevada.

(d) Points in Oregon except points in Trans-Mississippi River territory as described in Note 22, pages 76 and 77 of tariff, as amended.

(e) Points in Washington.

(f) Points in Wisconsin.

(g) Points in Upper Peninsula of Michigan.

(h) Points west of the Minnesota-Wisconsin State Line, except points in Trans-Mississippi River Territory as described in Note 22, pages 76 and 77 of tariff, as amended.

(i) Points in the Dominion of Canada, viz: All points in the Provinces of Alberta, British Columbia, Manitoba, and Saskatchewan.

(j) On Ex-Lake shipments which arrived by Lake Carrier Vessel at Chicago, Ill., Kewaunee, Wis., Mackinaw City, Mich., Manitowoc, Wis., Menominee, Mich., Manistique, Mich., and Milwaukee, Wis. These rates are applicable on Ex-Lake shipments as of the date such shipments are reshipped via rail from the Lake Ports named above.

These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Exception.—The rates subject to the provisions of this Note will not apply from points in the Chicago Switching District as defined in Freight Tariff No. 20-X, Agent R. G. Raasch's I. C. C. No. 584, or E. J. & E. stations: Hammond, Ind., South Chicago, Ill., and South Chicago (98th St.), Ill., on traffic reaching such reshipping points via river or canal. See Note 19, above.

264–15 Note 45 Cancels Note 45, pages 85 and 86 of tariff.

RESHIPPING

Application of Reshipping or Proportional Rates Applicable on Traffic Originating at Points in the Territory as Described Below

Where reference is made to this note rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line (except Illinois Grain moving via water transportation line also see Exception below) that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in the territory as described below; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rates from the reshipping point to be added to the reshipping or proportional rate therefrom.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Exception.—The rates subject to the provisions of this Note will not apply from points in the Chicago Switching District as defined in Freight Tariff No. 20-X, Agent R. G. Raasch's I. C. C. No. 584, or E. J. & E. stations: Hammond, Ind., South Chicago, Ill., and South Chicago (98th St.), Ill., on traffic reaching such reshipping points via river or canal. See Note 19, page 2 herein.

A-1. Rates on Grain from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., and Milwaukee, Wis. and points taking same rates as shown on pages 7 to 10 inclusive, of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain when originating at points beyond. Will not apply on traffic

originating in Trans-Mississippi River or Northwest territories (for description, see Notes 22 and 40, pages 76, 77, 83 and 84 of tariff, as amended).

A–2. Rates on Grain Products from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., Milwaukee, Wis., and points taking same rates as shown on pages 7 to 10, inclusive of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain Products originating beyond. Will not apply on traffic originating in Trans-Mississippi River or Northwest Territories (for description, see Notes 22 and 40, pages 76, 77, 83 and 84 of tariff, as amended).

B–1. Rates on Grain from Peoria, Ill., and points taking same rates as shown on pages 7 to 10, inclusive of tariff, as amended (except as provided in paragraph B–2 hereof), subject to the provisions of this Note, apply on shipments of Grain when originating at points beyond. Will not apply on traffic originating in Trans-Mississippi River or Northwest Territories (for description, see Notes 22 and 40, pages 76, 77, 83, and 84 of tariff, as amended).

B–2. Rates on Grain from Peoria, Ill., subject to the provisions of this Note will apply from Peoria, Bloomington, Crescent, Pekin, South Bartonville and Springfield, Ill., only as follows:

(a) As proportional or reshipping rates on shipments originating at stations shown in tariffs named in Note A, page 4 herein, supplements thereto or successive issues thereof, from which proportional rates are published to Peoria, Bloomington, Crescent, Pekin, South Bartonville or Springfield, Ill., and only when such proportional rates are assessed into Peoria, Bloomington, Crescent, Pekin, South Bartonville or Springfield, Ill., and when the grain is destined to the following points:

Bellaire	Ohio	Elizabeth	Pa.
Belle Vernon	Pa.	Elwood City	Pa.
Bessemer	Pa.	Erie	Pa.
Black Rock	N. Y.	Fairchance	Pa.
Blairsville	Pa.	Gauley Bridge	W. Va.
Bridgeport	Ohio	Grafton	W. Va.
Brownsville	Pa.	Huntington	W. Va.
Buffalo	N. Y.	Indiana	Pa.
Charleston	W. Va.	Irvineton	Pa.
Connellsville	Pa.	Jacobs Creek	Pa.
Corry	Pa.	Johnstown	Pa.
Crabtree	Pa.	Leckrone	Pa.
Dunkirk	N. Y.	Masontown	Pa.
East Buffalo	N. Y.	Maxwell	Pa.

Monongahela ----------Pa.	Point Pleasant--------W. Va.
Moundsville----------W. Va.	Ravenswood----------W. Va.
New Martinsville------W. Va.	Salamanca----------N. Y.
Niagara Falls----------N. Y.	Suspension Bridge------N. Y.
North Tonawanda-------N. Y.	Titusville----------Pa.
Oil City----------Pa.	Washington ----------Pa.
Parkersburg----------W. Va.	West Newton----------Pa.
Pittsburgh ----------Pa.	Wheeling----------W. Va.

and points named on pages 11 to 69 of tariff, as amended, taking same rates or arbitraries higher.

(b) As proportional or reshipping rates on shipments originating at points beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 22, pages 76 and 77 of tariff, as amended), Northwest Territory (see Note 40, pages 83 and 84 of tariff, as amended), or traffic covered by paragraph (a), Section B-2 of this note.

B-3. Rates on Grain Products from Peoria, Ill., and points taking same rates as shown on pages 7 to 10, inclusive, of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain Products (except on commodities bearing reference mark (50)), originating beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 22, pages 76 and 77 of tariff, as amended), Northwest Territory (see Note 40, pages 83 and 84 of tariff, as amended), except as otherwise provided in paragraph B-5 page 4 herein or on shipments subject to rates governed by the provisions of Note 50, page 87 of tariff, as amended, except that on shipments originating at stations shown in tariffs named in Note A page 4 herein, from which proportional rates are published to Peoria, Ill., and points taking same rates as shown on pages 7 to 10 inclusive, of tariff, as amended, and when the grain products are destined to the following points, rates on grain products subject to this Note, will only apply when the proportional rates published in tariffs named in Note A page 4 herein, are assessed on the inbound shipments to Peoria, Ill., and points taking same rates as shown on pages 7 to 10, inclusive of tariff, as amended.

Bellaire----------Ohio	Corry----------Pa.
Belle Vernon ----------Pa.	Crabtree ----------Pa.
Bessemer ----------Pa.	Dunkirk----------N. Y.
Black Rock----------N. Y.	East Buffalo----------N. Y.
Blairsville----------Pa.	Elizabeth----------Pa.
Bridgeport----------Ohio	Elwood City----------Pa.
Brownsville ----------Pa.	Erie ----------Pa.
Buffalo----------N. Y.	Fairchance ----------Pa.
Charleston----------W. Va.	Gauley Bridge--------W. Va.
Connellsville----------Pa.	Grafton----------W. Va.

Huntington	W. Va.	North Tonawanda	N. Y.
Indiana	Pa.	Oil City	Pa.
Irvineton	Pa.	Parkersburg	W. Va.
Jacobs Creek	Pa.	Pittsburgh	Pa.
Johnstown	Pa.	Point Pleasant	W. Va.
Leckrone	Pa.	Ravenswood	W. Va.
Masontown	Pa.	Salamanca	N. Y.
Maxwell	Pa.	Suspension Bridge	N. Y.
Monongahela	Pa.	Titusville	Pa.
Moundsville	W. Va.	Washington	Pa.
New Martinsville	W. Va.	West Newton	Pa.
Niagara Falls	N. Y.	Wheeling	W. Va.

and points named on pages 11 to 69 of tariff, as amended, taking same rates or arbitraries higher.

264—16 B-4. Rates on Grain Products bearing reference mark ⑤⓪ from Peoria, Ill., and points taking same rates as shown on pages 7 to 10, inclusive of tariff, as amended, subject to the provisions of this Note, apply on shipments originating beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 22, pages 76 and 77 of tariff, as amended), or Northwest Territory (see Note 40, pages 83 and 84 of tariff, as amended), except as otherwise provided in paragraph B-5, below.

B-5. Rates on Grain Products from Peoria, Ill., and points taking same rates as shown on pages 7 to 10 inclusive, of tariff, as amended, subject to the provisions of this Note, apply on shipments originating at points in Northwest territory and destined to points in the States of Indiana, Michigan and Ohio bearing reference "①" on pages 136 to 140 of tariff, as amended, under heading Northwest (see Note 40, pages 83 and 84 of tariff, as amended).

NOTE A

Issuing Line or Agent	Tariff No.	ICC No.	Item, Index or Reference No.
AT&SFRy	7124-I	13039	Items Nos. 165, 170, 175, 180, 185, 190.
AltonRR	1604-O	208	Item 220.
CB&QRR	G. F. O. 1346-T	19087	Items 750 to 970.
C&IMRy	5-J	B-298	Page 11.
C&NWRy	G. F. D. 17042-B	10816	Circle Reference ⑤ pages 23 and 24
CRI&PRy	3450-B	C-12847	Item No. 300.
ICRR	1537-K	A-11149	Index Nos. 396, 401, and 502 to 510 incl.
IHTRR	480-F	51	Item 60.
M&StLRy	1500-I	B-1024	Pages 79 and 80.
NYCRR	701	480	
NYC&StLRR	G. F. D. 45-U	5891	Note 7.
P&WVRy		67	Item 330.
PTCo	19-F	10	Item 370.
PRR	72-C	2333	Item 500.
S&SWRR	30-A (C&A&StLRy)	59	Item 85.
TP&WJRR	155	255	

Note 47 Cancels Note 47, page 87 of tariff.

Application of Reshipping or Proportional Rates Applicable on Traffic Originating at Points in the Territory as Described Below

Where reference is made to this Note, rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line (except Illinois Grain moving via water transportation line; also see Exception below) that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in the territory as described below; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rates from the reshipping point to be added to the reshipping or proportional rate therefrom.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Rates on By-Products of Grain (see Note 5, page 75 of tariff), from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., Milwaukee, Wis., and points taking same rates as shown on pages 7 to 10 inclusive of tariff, as amended, subject to the provisions of this Note, will apply on shipments of By-Products of Grain when originating at points beyond, except origin territory covered by Trans-Mississippi River Territory (see Note 22, pages 76 and 77 of tariff, as amended) or Northwest Territory (see Note 40, pages 83 and 84 of tariff, as amended).

Will also apply on Ex-Lake shipments which arrive by Lake Carrier Vessel or on By-Products of Grain milled, mixed or manufactured from Grain which arrive by Lake Carrier Vessel, at Chicago, Ill., Kewaunee, Wis., Manitowoc, Wis., Menominee, Mich., Manistique, Mich., and Milwaukee, Wis.

Rates on By-Products of Grain, from Peoria, Ill., and points taking same rates as shown on pages 7 to 10, inclusive of tariff, as amended, subject to the provisions of this Note, apply on shipments of By-Products of Grain, originating beyond, except origin territory covered by Trans-Mississippi River Territory (see Note 22, pages 76 and 77 of tariff, as amended), or Northwest Territory (see Note 40, pages 83 and 84 of tariff, as amended).

Exception.—The rates subject to the provisions of this Note will not apply from points in the Chicago Switching District as defined in Freight Tariff No. 20–X, Agent R. G. Raasch's I. C. C. No. 584, or E. J. & E. stations: Hammond, Ind., South Chicago, Ill., and South Chicago (98th St.), Ill., on traffic reaching such reshipping points via river or canal. See Note 19, page 2 herein.

RULES AND REGULATIONS

Item No. 553 (New).

Fourth Section Application

Fourth Section Application, C. F. A. No. 1080; dated May 31, 1945; in connection with Grain, Grain Products, Grain By-Products (Ex-River and Canal).

264–17: Amend pages 120 to 123 of tariff by the addition of the following:

RATES ON GRAIN AND GRAIN PRODUCTS, C. L., SEE NOTE 5, PAGE 75 OF TARIFF APPLYING FROM CHICAGO, ILL.

and points taking same rates as named in note 125, page 8, herein. Rates are not subject to application of rates as provided on pages 7 to 10, inclusive, of tariff, as amended. See note 19, page 2, herein.

(Issued in conformity with findings of the Interstate Commerce Commission in I. & S. Docket 4718, decided February 13, 1945.)

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see item No. 850)	To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see item No. 850)
Adrian, Mich	15	Augusta, Ohio	(6) 23
Afton, Ohio	21		(6) 23½
Akron, Ind	13	Aurora, Ohio	18
Akron, Ohio	18	Avilla, Ind	15
Alba, Mich	20	Avoca, Ind	18
Albany, Ohio	21	Ayrshire, Ind	16
Albion, Mich	15	Bad Axe, Mich	18
Albion, Pa	21	Bailey, Mich	17
Alcona, Mich	21	Bainbridge, Ohio	21
Alexandria, Ind	15	Baldwin, Mich	17
Allen, Mich	15	Bancroft, Mich	15
Alliance, Ohio	18	Barce, Ind	13
Alma, Mich	15	Basil, Ohio	21
Alpena, Mich	21	Battle Creek, Mich	15
Amanda, Ohio	21	Bay City, Mich	15
Anderson, Ind	15	Beach City, Ohio	20
Angell, Mich	20	Beatrice, Ind	12
Ann Arbor, Mich	15	Beaverton, Mich	17
Ansonia, Ohio	15	Beck, Ind	16
Antwerp, Ohio	15	Bedford, Ind	18
Argos, Ind	12	Bellaire, Ohio	(6) 23
Artic, Ind	15		(6) 23½
Ashland, Ky	21	Belle Centre, Ohio	15
Ashtabula, Ohio	21	Bellefontaine, Ohio	15
Athens, Ohio	21	Bellevue, Ohio	18
Attica, Ind	13	Belshaw, Ind	10
Atwater, Ohio	18	Benton Harbor, Mich	12
Auburn, Ind	15	Bentonville, Ind	17
		Berne, Ind	15

Footnotes at end of table.

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see item No. 850)
Berry, Mich	17
Big Rapids, Mich	17
Black Rock, N. Y	(1) 23
	(2) 23½
Blairsville, Pa	(1) 25
	(2) 25½
Bluffton, Ind	15
Bolivar, Ind	13
Bowerston, Ohio	21
Boyne City, Mich	20
Brazil, Ind	15
Briant, Ind	15
Brice, Ind	15
Bristol, Ind	13
Brook, Ind	13
Brookville, Ohio	18
Brownsville, Pa	(1) 25
	(2) 25½
Bryan, Ohio	15
Bucyrus, Ohio	15
Buffalo, N. Y	(1) 23
	(2) 23½
Bunker Hill, Ind	15
Butler, Ind	15
Cadillac, Mich	18
Cambridge, Ohio	21
Canal Fulton, Ohio	18
Canton, Ohio	18
Carlisle, Ohio	18
Carsonville, Mich	18
Caseville, Mich	18
Cassopolis, Mich	15
Catlettsburg, Ky	21
Cecil, Ohio	15
Cedar Springs, Mich	15
Celina, Ohio	15
Centre Line, Mich	15
Charleston, W. Va	(1) 23
	(2) 23½
Charlotte, Mich	15
Cheboygan, Mich	21
Chesterfield, Ind	15
Chillicothe, Ohio	21
Cincinnati, Ohio	18½
Circleville, Ohio	21
Clare, Mich	17
Clare, Ohio	18½
Clarksville, Mich	15
Clay City, Ind	18
Cleveland, Ohio	18
Cloverdale, Ind	17
Colfax, Ind	13
Coloma, Mich	15
Columbia City, Ind	13
Columbus, Ind	18
Columbus, Ohio	18
Columbus Grove, Ohio	15
Conneaut Lake, Pa	(1) 23
	(2) 23½

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see item No. 850)
Connellsville, Pa	(1) 25
	(2) 25½
Connersville, Ind	18
Conotton, Ohio	(1) 23
	(2) 23½
Corning, Ohio	21
Corry, Pa	(1) 23
	(2) 23½
Cortland, Ohio	21
Coshocton, Ohio	21
Crabtree, Pa	(1) 25
	(2) 25½
Crane, Ind	18
Crawfordsville, Ind	13
Crestline, Ohio	18
Crete, Ind	17
Crown Point, Ind	12
Cutler, Ind	13
Cygnet, Ohio	15
Dayton, Ohio	18
Davis, Ohio (Portage Co.)	18
Decatur, Ind	15
Defiance, Ohio	15
Delaware, Ohio	18
Delphos, Ohio	15
Delphi, Ind	13
Denver, Ind	13
Deshler, Ohio	15
Detroit, Mich	15
Dixon, Ohio	15
Dover, Ohio	21
Dresden, Ohio	21
Dryden, Mich	18
Dunkirk, Ind	15
Dunkirk, N. Y	(1) 23
	(2) 23½
Dunreith, Ind	17
Dyer, Ind	12
East Buffalo, N. Y	(1) 23
	(2) 23½
Eames, Mich	15
East Rochester, Ohio	(1) 23
	(2) 23½
East Tawas-Tawas City, Mich	21
Eaton, Ind	15
Eaton Rapids, Mich	15
Edgerton, Ohio	15
Elk Rapids, Mich	20
Elroy, Ohio	15
Erie, Pa	(1) 23
	(2) 23½
Evansville, Ind	16
Fairchance, Pa	(1) 25
	(2) 25½
Fairmont, W. Va	(1) 25
	(2) 25½
Fair Oaks, Ind	12

(1) Applies on Grain only.
(2) Applies on Grain Products only.

♦Increase.
♦Reduction.

264–18 RATES ON GRAIN AND GRAIN PRODUCTS, C. L., SEE NOTE 5, PAGE 75 OF TARIFF APPLYING FROM CHICAGO, ILL.

and points taking same rates as named in note 125, page 8, herein. Rates are not subject to application of rates as provided on pages 7 to 10, inclusive of tariff, as amended. See note 19, page 2, herein.

(Issued in conformity with findings of the Interstate Commerce Commission in I. & S. Docket 4718, decided February 13, 1945.)

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see item No. 850).
Fairport Harbor, Ohio	21
Farwell, Mich	17
Findlay, Ohio	15
Flint, Mich	15
Fort Recovery, Ohio	15
Fort Wayne, Ind	15
Fostoria, Ohio	15
Frances, Ind	17
Frankfort, Ind	13
Frankfort, Mich	16
Franklin, Ind	17
Frazier, Ohio	21
Frederic, Mich	20
Fremont, Mich	17
Fulton, Ind	13
Gallipolis, Ohio	21
Garrett, Ind	15
Gas City, Ind	15
Gauley Bridge, W. Va	(c) 25 (c) 25½
Gilead, Ind	13
Glasgow, W. Va	(c) 25 (c) 25½
Glenmore, Ohio	15
Goodland, Ind	13
Goshen, Ind	13
Gwynn, W. Va	(c) 25 (c) 25½
Grand Rapids, Mich	15
Grayling, Mich	20
Greencastle, Ind	15
Greenfield, Ohio	21
Greenville, Mich	15
Greenville, Ohio	17
Guion, Ind	13
Guernsey, Ind	13
Haggerstown, Ind	15
Hamilton, Ohio	18
Harbor Beach, Mich	18
Harrison, Mich	17
Hart, Mich	17
Hawks, Ohio	21
Hebron, Ohio	21
Helena, Ohio	15
Hempstead, Ohio	18
Henderson, Ky	18
Henry St., Mich	20
Hillsboro, Ohio	21
Hillsdale, Ind	13
Houston Jct., Pa	(c) 23 (c) 23½
Howard City, Mich	17
Huntington, W. Va	23
Imlay City, Mich	15
Indiana, Pa	(c) 25 (c) 25½
Indianapolis, Ind	15
Ingomar, Ohio	18
Interlochen, Mich	18
Ionia, Mich	15
Irondale, Ohio	(c) 23 (c) 23½
Ironton, Ohio	21
Irvineton, Pa	(c) 25 (c) 25½
Jackson, Mich	15
Jackson, Ohio	21
Jasper, Ind	18
Jamestown, Pa	21
Jeffersonville, Ind	18½

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see item No. 850)
Johnstown, Pa	(c) 25 (c) 25½
Junction City, Ohio	21
Kalamazoo, Mich	15
Kalkaska, Mich	18
Kawkawlin, Mich	15
Kendallville, Ind	15
Kennard, Ind	15
Kenton, Ohio	15
Kewanna, Ind	13
Knightstown, Ind	17
Kokomo, Ind	13
Kunkle, Ohio	15
La Crosse, Ind	12
La Fayette, Ind	13
Lancaster, Ohio	21
Lansing, Mich	15
La Otto, Ind	15
Lapeer, Mich	15
La Porte, Ind	12
Larwill, Ind	15
Lathrop, Ohio	21
Lawton, Mich	15
Leavittsburg, Ohio	21
Lebanon, Ind	15
Lebanon, Ohio	18
Leechburg, Pa	(c) 25 (c) 25½
Lee, Ind	12
Leipsic, Ohio	15
Lima, Ohio	15
Lisbon, Ohio	21
Logansport, Ind	13
Logootee, Ind	18
Losantville, Ind	17
Louisville, Ky	20
Loveland, Ohio	18½
Ludington, Mich	17
Lynn, Ind	17
Mackinaw City, Mich	21
Madison, Ind	18½
Manistee, Mich	17
Mansfield, Ohio	18
Marietta, Ohio	21
Marion, Ind	15
Marion, Ohio	15
Martinsville, Ind	17
Mason, Ohio	18
Masontown, Pa	(c) 25 (c) 25½
Massillon, Ohio	18
Mattawan, Mich	15
Maxwell, Pa	(c) 25 (c) 25½
Maysville, Ky	21
Mechanicstown, Ohio	(c) 23 (c) 23½
Michigan City, Ind	12
Middletown, Ind	15
Middletown, Ohio	18
Midland, Mich	17
Midland City, Ohio	21
Millersburg, Ind	13
Millwood, W. Va	(c) 23 (c) 23½
Mishawaka, Ind	13
Mitchell, Ind	18
Moline, Ohio	15
Montmorency, Ind	13
Monon, Ind	13

Footnotes at end of table.

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see Item No. 850)
Morocco, Ind	12
Mt. Vernon, Ohio	18
Muncie, Ind	15
Muskegon, Mich	15
New Albany, Ind	18½
Newark, Ohio	18
New Bethlehem, Pa	⑤25
	⑥25½
New Buffalo, Mich	12
New Castle, Ind	15
Newcomerstown, Ohio	21
New Galilee, Pa	21
New Madison, Ohio	17
New Paris, Ohio	17
New Philadelphia, Ohio	21
Niagara Falls, N. Y	⑤23
	⑥23½
Niles, Mich	12
Noblesville, Ind	15
North Hayden, Ind	10
North Judson, Ind	12
North Kenova, Ohio	21
North Manchester, Ind	13
North Tonawanda, N. Y	⑤23
	⑥23½
North Vernon, Ind	18
264-19 Northville, Mich	15
Oakland, Ohio	18
Oakland City, Ind	16
Oil City, Pa	⑤23
	⑥23½
Omer, Mich	20
Ottawa, Ohio	15
Owendale, Mich	18
Owensboro, Ky	21
Owosso, Mich	17
Oxford, Ind	13
Parkersburg, W. Va	⑤23
	⑥23½
Peoria, Ohio	15
Peru, Ind	13
Petoskey, Mich	20
Pinconning, Mich	20
Piqua, Ohio	17
Pittsburgh, Pa	⑤23
	⑥23½
Pittsford, Mich	15
Plymouth, Ind	12
Portage, Mich	15
Port Huron, Mich	15
Portland, Ind	15
Portsmouth, Ohio	21
Prescott, Mich	20
Princeton, Ind	16
Putnamville, Ind	17
Ravenna, Ohio	18
Ravenswood, W. Va	⑤23
	⑥23½
Red Key, Ind	15
Reed City, Mich	17
Richmond, Ind	17
Richmond, Mich	15
Ridgeway, Ohio	15
Roachdale, Ind	15
Rochester, Mich	15
Rockville, Ind	13
Rosedale, Ohio	15
Rushville, Ind	18
St. Clair, Mich	15
Salamanca, N. Y	⑤23
	⑥23½

To stations named below and stations taking same rates as named on pages 11 to 69 of tariff, as amended	Rates in cents per 100 lbs. (see Item No. 850)
Sandusky, Ohio	18
Savona, Ohio	17
Seymour, Ind	18
Shadeland, Ind	13
Shawnee, Ohio	21
Sheff, Ind	13
Shelbyville, Ind	17
Shenango, Pa	21
Shirley, Ind	15
Sidney, Ohio	17
South Bend, Ind	12
South Lenore, Ind	17
South Whitley, Ind	13
Springfield, Ohio	18
Steubenville, Ind	15
Stroh, Ind	15
Sturgis, Mich	15
Sullivan, Ind	15
Summit, Ind	15
Suspension Bridge, N. Y	⑤23
	⑥23½
Switz City, Ind	18
Syracuse, Ind	15
Terre Haute, Ind	13
Tiffin, Ohio	15
Titusville, Pa	⑤23
	⑥23½
Toledo, Ohio	15
Tower, Mich	21
Treaty, Ind	15
Traverse City, Mich	20
Trimble, Ohio	21
Troy, Ohio	17
Uhrichsville, Ohio	21
Union City, Ind.-Ohio	15
Upland, Ind	15
Upper Sandusky, Ohio	15
Urbana, Ind	15
Urbana, Ohio	18
Valparaiso, Ind	12
Vanlue, Ohio	15
Van Wert, Ohio	15
Veedersburg, Ind	13
Vicksburg, Mich	15
Vincennes, Ind	16
Wabash, Ind	15
Washington, Ind	18
Washington C. H., Ohio	21
Weidman, Mich	17
Weishaars, Ind	13
Wellston, Ohio	21
West Branch, Mich	20
West Carrollton, Ohio	18
West Fairport, Ohio	21
West Loudonville, Ohio	18
Westfield, Ind	15
West Lebanon, Ind	13
West Melcher, Ind	13
West Pittsburgh, Pa	⑤23
	⑥23½
Wheeling, W. Va	⑤23
	⑥23½
Winchester, Ind	15
Wolcottville, Ind	15
Woodlington, Ohio	15
Worthington, Ind	18
Xenia, Ohio	18
Youngstown, Ohio	21
Ypsilanti, Mich	15
Zadoc, Ind	12
Zanesville, Ohio	21

⑤Applies on Grain only.
⑥Applies on Grain Products only.
For explanation of other reference marks, see page 72 of tariff.
♦Increase.
♦Reduction.

264-20 Amend pages 120 to 123 of tariff, by the addition of the following:

RATES ON BYPRODUCTS OF GRAIN, C. L., SEE NOTE 5, PAGE 75 OF TARIFF APPLYING FROM CHICAGO, ILL.

and points taking same rates as named in note 125, page 8, herein. Rates are no subject to application of rates, as provided on pages 7 to 10, inclusive, of tariff, as amended. See note 19, page 2, herein.

(Issued in conformity with findings of the Interstate Commerce Commission in I. & S. Docket 4718, decided February 13, 1945.)

To stations named below and stations taking same rates as named on pages 11 to 69, inclusive of tariff, as amended	Rates in cents per 100 lbs. (see Item No. 850)	To stations named below and stations taking same rates as named on pages 11 to 69, inclusive of tariff, as amended	Rates in cents per 100 lbs. (see Item No. 850)
Albion, Pa	21	Jamestown, Pa	21
Ashland, Ky	21	Johnstown, Pa	25½
Ashtabula, Ohio	21	Leavittsburg, Ohio	21
Bellaire, Ohio	23½	Leckrone, Pa	25½
Black Rock, N. Y	23½	Lisbon, Ohio	21
Blairsville, Pa	25½	Marietta, Ohio	21
Bowerston, Ohio	21	Masontown, Pa	25½
Brownsville, Pa	25½	Maxwell, Pa	25½
Buffalo, N. Y	23½	Millwood, W. Va	23½
Charleston, W. Va	23½	New Bethlehem, Pa	25½
Connellsville, Pa	25½	New Galilee, Pa	21
Corry, Pa	23½	New Philadelphia, Ohio	21
Cortland, Ohio	21	Niagara Falls, N. Y	23½
Crabtree, Pa	25½	North Tonawanda, N. Y	23½
Dover, Ohio	21	Oil City, Pa	23½
Dunkirk, N. Y	23½	Parkersburg, W. Va	23½
East Buffalo, N. Y	23½	Pittsburgh, Pa	23½
Erie, Pa	23½	Ravenswood, W. Va	23½
Fairchance, Pa	25½	Salamanca, N. Y	23½
Fairmont, W. Va	25½	Shenango, Pa	21
Fairport Harbor, Ohio	21	Suspension Bridge, N. Y	23½
Gallipolis, Ohio	21	Titusville, Pa	23½
Gauley Bridge, W. Va	25½	Uhrichsville, Ohio	21
Grafton, W. Va	25½	West Fairport, Ohio	21
Huntington, W. Va	23	Wheeling, W. Va	23½
Indiana, Pa	25½	Youngstown, Ohio	21
Irvington, Pa	23½		

Note 125.—Where reference is made to this note, rates will apply from the following points:

Argo	Ill.	Gibson Transfer	Ind.
Ashburn	Ill.	Globe	Ill.
Berger	Ill.	Grand Crossing	Ill.
Blue Island	Ill.	Grasselli	Ind.
Broadview	Ill.	Hammond	Ind.
Brookdale	Ill.	Harvey	Ill.
Burnham	Ill.	Hawthorne	Ill.
Calumet	Ind.	Hegewisch	Ill.
Calumet City	Ill.	Hessville	Ill.
Calumet Park	Ill.	Hutchinson	Ill.
Chicago, Ill	Ill.	Indiana Harbor	Ind.
Chicago Lawn	Ill.	Kensington	Ill.
Clabarn	Ill.	Mt. Greenwood	Ill.
Dolton	Ill.	North Hammond	Ind.
East Chicago	Ind.	Oakdale	Ill.
East Side	Ill.	100th St	Ill.
Elsdon	Ill.	Osborn	Ind.
Englewood	Ill.	Pullman Jct	Ill.
Englewood (76th Street)	Ill.	Republic	Ind.
Evergreen Park	Ill.	Riverdale	Ill.
Fernwood	Ill.	Robertsdale	Ind.
Forest Hill	Ill.	Roby	Ind.
Forty-seventh St	Ill.	Roseland	Ill.
Gibson	Ind.	Solvay	Ill.
		South Chicago	Ill.

Note 125.—Where reference is made to this note, rates will apply from the following points—Continued

South Chicago (98th St.)	Ill.	Washington Heights	Ill.
South Deering	Ill.	West Pullman	Ill.
South Hammond	Ind.	Whiting	Ind.
Stony Island	Ill.	Yard Center	Ill.

266 In the District Court of the United States

Civil Action File No. 45–C–865

Civil Action File No. 45–C–866

Civil Action File No. 45–C–1020

[Titles omitted.]

Order

October 4, 1945

These causes having been heretofore consolidated, and coming on this day for hearing before this court of three judges, one of whom is a Circuit Judge, specially constituted in conformity with the statute in such case made and provided, upon the applications of the complainant-petitioners for relief pendente lite. And the court having examined the complaints or petitions, the answers thereto of the United States of America by the Attorney
267 General of the United States, admitting the averments of said complaints or petitions and that relief as therein prayed should be granted, and the answer of the Interstate Commerce Commission, and the said applications for relief pendente lite, the court having received evidence, heard the arguments of counsel, and being fully advised in the premises, it appears to the court that it has full, complete and perfect jurisdiction in the premises. And it further appearing to the court:

1. Notice of this hearing and application for relief pendente lite was duly served upon the Interstate Commerce Commission and the Attorney General of the United States on October 1, 1945, three days prior to the date of this hearing, as provided by law.

2. Irreparable damage would result to the plaintiff-petitioner, A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, unless relief pendente lite were granted as hereinafter ordered, as appears to the court from evidence submitted to it, namely, the evidence of the witnesses, J. O. McClintock, F. A. Mechling and Norman C. Horn. The nature of such irreparable damage being specifically as follows:

a. As to A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line (hereinafter called the

Mechling Line) it appears to the court from the evidence of said McClintock and Mechling that the Mechling Line would be deprived of a substantial part of its revenue in the only transportation in which it is authorized under the Interstate Commerce Act to engage if the basis of rail charges on ex-barge grain described by the portion of the order complained of herein by the complainant Mechling Line were permitted to become effective under the tariffs filed by the Eastern Railroads in conformity with said order of the Interstate Commerce Commission. Presently, and for many years, the Eastern Railroads have made the
268. same charges for their service in transporting to eastern destinations grain reshipped at Chicago, Illinois, regardless of whether said grain had arrived at Chicago by barge, over the line of the Mechling Line and other barge lines, or by rail over the lines of the Western Railroads, or by vessels over the lakes. The portion of said order of the Interstate Commerce Commission complained of as aforesaid, prescribes a basis of charges for their said service in the transportation of grain that has arrived in Chicago ex-barge that is three cents per hundred pounds higher than for their services for the transportation of grain that has arrived in Chicago ex-rail or ex-lake to the most important eastern destinations, namely, destinations in New England and east of a line drawn northerly and southerly through Buffalo, New York, and Pittsburgh, Pennsylvania; that in event the said prescribed basis of rail charge for ex-barge grain were to become effective, reshippers of grain from Chicago would be unable to sell ex-barge grain in competition with ex-rail grain and ex-lake grain for shipment via rail to the east and the barge lines would be practically excluded from the grain traffic into Chicago for reshipment there by rail to eastern destinations; that said Mechling Line is certified under the Interstate Commerce Act by the Interstate Commerce Commission only as a common carrier of grain; that over ninety per centum (90%) of its revenue in the transportation of grain is derived from the transportation of grain to Chicago, Illinois, for reshipment there to interstate and foreign destinations; that the volume of grain so transported to Chicago for such reshipment there by the Meckling Line exceeded twelve million (12,000,000) bushels in 1944, and like amounts would be so transported by it in 1945, if said rate basis prescribed by said order of the Interstate Commerce Commission were not to become effective; that the rail tariffs that have been filed in conformity with said
269. order by the Eastern Railroads propose to put said rate basis into effect on October 5, 1945, shortly prior to the transportation movement of the 1945 corn crop; that the operation and effect of the new rate basis for ex-barge grain on grain re-

shipped by rail from Chicago, Illinois, to eastern destinations would be immediately to deprive said Mechling Line of a large part of its revenue from the grain traffic, which is the only traffic in which it has been authorized by the Interstate Commerce Commission to engage.

b. As to the Inland Waterways Corporation, it appears from the evidence of Norman C. Horn, that it solicits grain from various origins for barge transportation to Chicago, Illinois, in competition with rail lines serving the same origins, and terminating at Chicago, and that if said basis of rail charges should become effective said Inland Waterways Corporation will not secure for transportation to Chicago as much grain as it would secure if the rate basis presently in effect were maintained, and that the averments of the affidavit of said Norman C. Horn are true.

c. As to the Secretary of Agriculture and the War Food Administrator, it appears to the court from the evidence of James K. Knudson that the public interests represented by the Secretary of Agriculture, that is the agricultural communities in the areas served by barge lines concerned herein will be adversely affected in that the price realized by said agricultural communities for grain will be reduced in an amount equal to the proportional rate differential ordered by the Commission in the order complained of herein, thereby reducing the level of income of said agricultural communities to their great harm.

270 Wherefore, it appearing to the court from the evidence of J. O. McClintock, F. A. Mechling, Norman C. Horn and James K. Knudson, that otherwise immediate, substantial and irreparable damage and injury would result to the plaintiff-petitioner barge lines, consisting of loss of revenue, and to the public interests represented herein by virtue of the statute in such case made and provided, by the Secretary of Agriculture and War Food Administrator.

Now, therefore, it is hereby ordered, adjudged, and decreed by the said Court that pending the hearing and determination of this consolidated cause for the period of sixty days (and for such further period, if any, as the court may hereafter direct according to law) the operations and effect of the order of the Interstate Commerce Commission entered on February 13, 1945, in Investigation and Suspension Docket 4718, Grain Proportionals, Ex-barge to Official Territory, insofar as said order authorizes the imposition of the basis of rail charges therein prescribed for the transportation of ex-barge grain out of Chicago, Illinois, that is differen-

tially less favorable to ex-barge grain than the rates presently in effect, be and it is hereby, restrained and enjoined, and the said Interstate Commerce Commission is restrained and enjoined from permitting to become effective any tariffs or tariff supplements that have been or may be published in conformity with said order of said Commission (including especially Supplement 133 to Agent B. T. Jones' I. C. C. No. 3356 and Supplement 27 to Agent B. T. Jones' I. C. C. No. 3363, issued June 1, 1945, filed with the Interstate Commerce Commission to take effect October 5, 1945) and said Commission is hereby enjoined forthwith to
271 take all steps needful faithfully to observe the said restraints hereby imposed pending the hearing and determination of this cause, including the suspension of said tariff publications.

Entered this 4th days of October 1945 at 3:45 P. M.

EVAN A. EVANS,
Circuit Judge.
M. L. IGOE,
District Judge.
WALTER J. LA BUY,
District Judge.

273 District Court of the United States

No. 45–C–1020

Present: Honorable MICHAEL L. IGOE, District Judge

SECRETARY OF AGRICULTURE OF THE UNITED STATES AND WAR FOOD ADMINISTRATOR

vs.

UNITED STATES OF AMERICA

Order consolidating causes

September 28, 1945

It is ordered by the Court that this cause be consolidated with causes numbered 45–C–865 and 45–C–866 for trial and that this cause be and it is hereby set for trial on October 15, 1945.

277 In the District Court of the United States

No. 45–C–865

No. 45–C–866

No. 45–C–1020

[Titles omitted.]

Transcript of proceedings

Filed Jan. 23, 1946

Transcript of proceedings had and evidence taken in the above-entitled causes before the Honorable Evan A. Evans, Judge of the United States Circuit Court of Appeals for the Seventh
278 Circuit, and the Honorable Michael L. Igoe and the Honorable Walter J. LaBuy, Judges of the United States District Court, in Court Room No. 627, United States Court House, Chicago, Illinois, on Tuesday, the 16th day of October, A. D. 1945, at 10:00 o'clock A. M.

Present: Messrs. Lord, Bissell and Kadyk, by Mr. Edward B. Hayes, appearing for A. L. Mechling Barge Line, Plaintiff. Mr. Luther M. Walter, appearing for Inland Waterways Corporation, Cross-complainant. Mr. James K. Knudson, appearing for the Department of Agriculture, Cross-Plaintiff. Mr. Edward W. Knowlton, and Mr. Daniel Kunkle, appearing for Interstate Commerce Commission, defendant. Mr. David O. Matthews, Special Assistant to the Attorney General; Mr. J. Albert Woll, United States District Attorney, by Mr. Kenneth S. Nathan, Assistant United States District Attorney, appearing for the United States of America, Defendant.

279 The CLERK. 45–C–865, Mechling Barge versus United States, for hearing.

Mr. NATHAN. If your Honors please, I would like to introduce Mr. David C. Matthews, Special Assistant to the Attorney General, appearing in behalf of the United States.

And Mr. Daniel Kunkle, of the Interstate Commerce Commission with Mr. Knowlton whom the court has known before.

Judge EVANS. Proceed.

Mr. HAYES. Pursuant to the order entered at the last session of this court the Interstate Commerce Commission entered its order suspending the tariffs and the supplement therein referred to, and a copy of that order has been furnished by the Commission to the several railroads interested.

I have here a copy of the order that was sent to me by the Interstate Commerce Commission. I will hand it to counsel for the Commission and ask if it may be agreed that this order was entered and has been furnished forthwith on its entry to the railroads interested.

Mr. KUNKLE. That is correct.

Judge EVANS. The Interstate Commerce council says, yes, that is true.

Mr. HAYES. I offer that as Exhibit B, together with the stipulation.

280 Judge EVANS. Received.

(Said document so offered and received in evidence, was marked "Exhibit B.")

Mr. HAYES. I have a number of certified copies to put in, if the Court please.

I believe that there has been transmitted to the Clerk of this court, the original record made in the prior proceeding, which was also kept available before the Commission on the further hearing that was held before it in this matter; and it is, as I understand, in the possession of the Clerk here in court.

The CLERK. Yes, I have it.

Mr. HAYES. I will offer it at this time as "Exhibit C."

Judge EVANS. Any objection?

Mr. KNOWLTON. No objection.

Judge EVANS. Received.

(Said document so offered and received in evidence, was marked "Exhibit C.")

Mr. HAYES. I have also——

Judge EVANS. I take it you are preparing this record, as you understand, on the liability of one side or the other taking it up to the Supreme Court.

281 Mr. HAYES. Forgive me?

Judge EVANS. Are you preparing this record this way, and your opponent, with the thought in mind of taking the case to the Supreme Court?

Mr. HAYES. Well, if the case does go to the Supreme Court, I should much prefer that my opponent should lead the way.

Judge EVANS. I understand; but I mean, you are preparing this record like this with that thought.

Mr. HAYES. That is the thought, your Honor. I have taken pains to give the court a complete record.

Judge EVANS. Very well; go ahead. Otherwise it is just a tremendous lot of lumber here.

Mr. HAYES. I now offer as "Exhibit D" certified copy of the record made at the reopened hearing.

Judge EVANS. Any objection?

Mr. KUNKLE. May I point out to the Court that we have not had an opportunity to examine that record? It appears to be a record before the Commission, and insofar as it is representative of that we have no objection, but we would like to reserve, if possible, the right to supplement that should it appear that there are matters before the Commission that are not included within the record.

Judge EVANS. Received.

282 (Said document so offered and re-received in evidence, was marked "Exhibit D.")

Mr. HAYES. There was offered at the prior hearing a certain tariff supplement filed pursuant to and reciting the portion of the order which is here complained of; and I offer this, together with the certificate of the Secretary of the Interstate Commerce Commission, on the merits, as Exhibit "E."

Mr. KUNKLE. Mr. Hayes, are those tariffs that have been suspended under order of the Court?

Mr. HAYES. They are.

Mr. KUNKLE. No objection.

Judge EVANS. Received.

(Said documents, so offered and received in evidence, were marked "Exhibit E.")

Mr. HAYES. I offer as Exhibit "F," certified copies, together with the certificate of the Secretary of the Commission, of the tariff supplements that were filed cancelling the eight and one-half cent penalty in obedience to that portion of the Commission's order.

Mr. KUNKLE. No objection.

Judge EVANS. Received.

283 (Said document, so offered and received in evidence, was marked "Exhibit F.")

Mr. HAYES. I offer as Exhibit "G" the order of the Commission postponing the effective date of the order here complained of, to June 5, 1945, as Exhibit "G."

Mr. KUNKLE. No objection.

Judge EVANS. Received.

(Said document, so offered and received in evidence, was marked "Exhibit G.")

Mr. HAYES. I offer as Exhibit "H," certified copy of the order reopening the hearing and setting it for hearing before the Commission, which was followed by the supplemental hearing, the record of which I have already introduced.

Mr. KUNKLE. No objection.

Judge EVANS. Received.

(Said document, so offered and received in evidence, was marked "Exhibit H.")

Mr. HAYES. I offer, together with the certificate of the Commission, orders entered by the Commission constituting the A. L. Mechling Barge Line a common-carrier, which are referred
284 to and noticed in the Report under attack.

Mr. KUNKLE. No objection.

Judge EVANS. Received.

(Said documents, so offered and received in evidence, were marked "Exhibit I.")

Mr. HAYES. I have here a certified copy of the order of the Commission under attack, but it is set forth in the complaint; and I will ask counsel, in order to save record, to agree that the order as set forth in the complaint may be received and accepted.

Mr. KUNKLE. We agree to that.

Judge EVANS. Received.

Mr. HAYES. There is one feature of the record further, perhaps two, upon which record can be saved if counsel will agree with me.

There appears on page 48 of the Bill of Complaint as filed by the Mechling Barge Line, a statement by the Commission which I believe to be wholly without any evidence, like some others, but this one is one in which record can be saved if agreement can be arrived at.

The statement to which I refer is this:

"Protestant-petitioners concede that they"—that is, the
285 existing rates on ex-barge grain—would be inappropriate for the ex-barge traffic if, like the intermarket proportionals, they had been prescribed by us instead of being voluntarily established by the respondent carriers."

Apparently, the Commission is seeking to convey by that statement that there was a concession before it by the protestant-petitioners here complaining of this order, that if the rates now existing had been established by the Commission, they would be inappropriate if they had been prescribed by the Commission instead of being voluntarily established by the respondent carriers.

There was no such concession. I do not wish to encumber the record with any argumentative presentation before the Commission, although I have it here under certificate, if counsel is free to concede that that construction of the Commission's remark is unfounded.

I may say I have spoken to counsel for the Commission on that score approximately a month ago, so that I am not taking anybody by surprised by that request and an opportunity to examine the record in that connection has been afforded.

Mr. KUNKLE. If the Court please, Mr. Hayes is here asking the Commission to concede as error a statement made

286 in the report which is under scrutiny by this court. It is true that Mr. Hayes spoke to me a month ago stating that a certain concession had been made, or that a certain statement that the petitioners had made a concession was in the report, and he would like me to stipulate that that was not the fact.

I told Mr. Hayes at that time that if he would point out the particular statement in the report that I would examine the record and the persons responsible in the preparation of the report, and if what he said was the fact I would be willing to stipulate that as the fact. But this morning is the first knowledge of the particular matter which he had in mind that I have received, and I am not in position at this time to make any stipulation that a statement in the report is inaccurate.

I would suggest if Mr. Hayes has the record prepared by which he intends to demonstrate the inaccuracy of that statement, why, he should present it in evidence.

Mr. HAYES. I am not going to quarrel with Mr. Kunkle's statement as to what occured at our conference. I have the record here, and I shall ask him, from that record which I present, to demonstrate the accuracy of the Commission's statement. There is nothing in there; and the only thing I can do to prove a negative is to say it is not in there. If he wants to find it, it will be
287 there for him to search for.

Mr. KUNKLE. If the Court please, I am interested in keeping this record as small as reasonably possible. I am willing to do now what I told Mr. Hayes I would do before now that I have the precise information as to the particular matter which he claims to be erroneous, and if upon my examination of the record I find his present statement to be correct, I think the Commission will be then ready to stipulate the matter so as to avoid the introduction in evidence of that portion of the record which he claims sustains his position.

Mr. HAYES. Perhaps we can apply that same rule to a further matter which can be got to very quickly, and which was also mentioned at our conference. It is true I did not give Mr. Kunkle our references to the report but I did call attention to the specific parts that I had in mind at that time.

On page 19 of the bill as filed by Mechling, the Commission says:

"The parties generally adhere to their original position; that is, protestant-petitioners contend that the ex-barge traffic is entitled to proportionals no higher than the ex-rail and ex-lake traffic"—

We will comment on that in connection with the further statement on page 51, which is:

288 "Protestant-petitioners ask that on the ex-barge traffic to trunk-line and New England territories we prescribe uniforms proportionals regardless of origin."

Now, that is not so. The same argumentative material well and amply meets that. What we are asking, and what we asked the Commission for we have in here. It is clearly stated on pages 6 and 7 of our brief before the Commission.

When the grain comes from the same western origin to Chicago, that is, to Chicago by rail or by barge, then the grain from that same origin territory should have the same out-bound charge for the rail service east.

Now, that is of some importance. The Supreme Court in its opinion said it was erroneous to say we could have the same proportionals regardless of origin. Whether or not the protestant-petitioners who were then before the Commission took the position attributed to them by the Supreme Court on the strength of that Commission report, is not the point now. What we want to make very plain here is that our position before the Commission was not, never has been, and is not before this Court, that origin has nothing to do with what the Commission can in its power do.

289 Our position is, that just so long as they make the ex-rail rates regardless of origin, then to make the difference on all origins ignoring in fixing the rate on the rail-borne grain as a basis for a discrimination against the ex-barge grain, is a violation of the Act.

Judge EVANS. I don't quite see any merit in your statement, personally, what you want to point out as erroneous. In the first place you say, you want to show that the parties generally adhere to their original position.

Mr. HAYES. I do not want to say that.

Judge EVANS. That is here. Well, that is what you have got stated here. I marked it on page 19. It appears there that both sides will adhere to their original position, and they will adhere to that right to the next court, too. I do not see how any attempt on your part to show that that statement may be erroneous will have any bearing on the outcome of this case.

Now, that next one. You say you are going to show that this Commissioner on page 51 was wrong when he said that "on ex-barge traffic we prescribe uniform proportionals regardless of origin."

Now, it strikes me that in the course of an argument that that would not be a good point for you to advance to show that the Commissioner did not get the position. But what difference does it make? There is what he says. You say he is wrong.

290 There is no need of any proof to show me whether it is

wrong. You are asserting to us that that was not your position, and never has been.

And the third one seems a little bit more ridiculous than the other, namely, that somebody in his opinion misstated a fact or insinuated something that was not so, namely, that "if the proposal had been made by us it would not have been as bad as if it was made by the Commission." Just what difference does that make whether he said that if he did say it?

Mr. HAYES. I appreciate fully your Honor's thought, but yet I do not want counsel for the Commission in his argument to tell me that I am now taking a position inconsistent with what I took before the Commission.

Judge EVANS. Well, the answer to that is, if your position was sound at any time it is going to be sound clear through; and if it was not sound, the mere fact that they said that "we would like you to initiate it instead of the other fellow," thereby the stigma would have been taken out, seems like a little child's play.

Mr. HAYES. It is, perhaps, from a superabundance of caution. I will ask that this be marked and received as Exhibit "K" and then if the stipulation is filed it can be withdrawn and be no part of the record.

Judge EVANS. Subject to that understanding, all right. If you wish later on to agree, if you find there was an
291 erroneous statement, or anything of that kind.

Mr. HAYES. I have now Exhibit "L," which is the last, and which is a certified copy of the application to the Commission to reopen this hearing, which I offer as Exhibit "L."

Judge EVANS. No objection. It may be received.

(Said document, so offered and received in evidence, was marked "Exhibit L.")

Mr. HAYES. Your Honors, I shall speak on behalf of A. L. Mechling——

Judge EVANS. Now, let us get on. Have you offered all you want to offer?

Mr. HAYES. I have offered all that I want to offer. I don't know whether the Commission has any evidence to offer.

Judge EVANS. That is what I want to know. Do you have anything to offer?

Mr. KUNKLE. We have nothing to offer.

Judge EVANS. Does anybody else here have anything to offer?

(No response.)

Judge EVANS. Now, who represents whom here today?

Mr. HAYES. I represent the plaintiff-petitioner, A. L. Mechling Barge Line.

292 Judge EVANS. Who represents the United States?

Mr. HAYES. The United States is represented by Mr. David C. Matthews. An answer has been filed on behalf of the United States and he will state his position if the Court desires.

Judge EVANS. What position do you take?

Mr. MATTHEWS. Your Honor, the United States has filed an answer in each of these three cases, asking that the plaintiff's petition be granted, and that we would be willing to state our position.

Judge EVANS. You are sort of a copetitioner.

Mr. MATTHEWS. Something of that sort.

Judge EVANS. Now, whom do you represent?

Mr. KNOWLTON. I represent the Interstate Commerce Commission, and Mr. Kunkle does also, sir.

Judge EVANS. You do not concede the propriety of the petition?

Mr. KUNKLE. We are in defense of that order.

Judge EVANS. You and the Attorney General, then, are on opposite sides.

Mr. KUNKLE. That is correct. I suggest to the Court that the United States is a statutory defendant.

Judge EVANS. Yes.

Mr. KUNKLE. And has fulfilled its function when it confesses error.

393 Judge EVANS. Yes, I understand.

Mr. KNUDSON. I represent the Secretary of Agriculture, your Honor. My name is James K. Knudson.

Judge EVANS. Which side are you on?

Mr. KNUDSON. We are coplaintiffs in this case lined up with the Barge Line.

Judge EVANS. And Mr. Walter?

Mr. WALTER. I represent the Inland Waterways Corporation, coplaintiff in C-866. We attack the order as void as it applies to us.

Judge EVANS. Well, I think under the circumstances and in view of the ruling—well, first, does anybody else want to introduce any evidence? If not, the testimony is closed.

Now, I think the only person we want to hear from, and we will hear from him first in view of the order that was previously made here a few weeks back, will be the Interstate Commerce Commission. I forget right now, I should know your name well enough.

Mr. KNOWLTON. Knowlton.

Judge EVANS. Mr. Knowlton. Mr. Knowlton was not in position to discuss the defense that depended upon the facts, and he said that you, or somebody else, had gone to another hearing

somewhere else and could not come here. He advanced the
294 legal objections to the propriety of the action which the plaintiff was seeking to have the Court take.

Now, we have heard him on it, and I think we might, if you have got anything to say, hear a statement of the factual situation and we will be glad to hear you; otherwise, we have heard the case.

Mr. KUNKLE. Does your Honor mean the factual situation relating to the jurisdictional question that is possibly in this case? Or do you desire an argument based upon the merits of the case as disclosed by the facts before the Commission?

Judge EVANS. I would think probably the latter.

Judge IGOE. That is what I would think.

Argument on behalf of the Interstate Commerce Commission

By Mr. KUNKLE:

May it please the Court: The complaints in this case attack the validity of an order of the Commission. The order in its terms is a permissive one. It in effect directs the cancellation of certain tariffs that were at issue in the proceeding before the Commission, and that is all the order in and of itself does.

In the report of the Commission, leading up to that order,
295 the Commission gave consideration to the establishment of rates on ex-barge grain traffic out of Chicago at a level different than the level of rates applicable on that traffic which are presently in effect, and different than the level of rates which were proposed under certain tariffs which were then ordered to be cancelled.

As the Court is probably aware, this case had its origin some years ago. The Commission did, or, rather, the Eastern carriers proposed to subject ex-barge grain traffic to the proportional rates which were in affect, or to the local rates which were then in effect on movements out of Chicago to eastern destinations, and thus to deny to the ex-barge grain traffic the use of certain proportional rates which were then being applied to that traffic.

The Commission upon protest suspended those tariffs and entered into an investigation concerning the lawfulness of the local rates as applied to the ex-barge grain traffic.

After its own powers of suspension had been exhausted during the pendency of the proceeding before it, the rail carriers voluntarily suspended those tariffs, so that net result has been that this ex-barge grain traffic has since 1933 and up to and including today, been enjoying the use of certain ex-rail proportionals on the outbound movement from Chicago.

296 The Commission ultimately determined, and in so doing it denied the argument advanced by the protestants, that

he ex-barge grain traffic was entitled, as a matter of law, to the same rates that the ex-rail traffic enjoyed; and in so deciding the Commission held that the application of the local rates, in the ight of the record then before it, to the ex-barge grain traffic, would not be in violation of any provision of the Interstate Commerce Act.

As your Honors will recall, the report and order was challenged n this Court and subsequently reached the Supreme Court. The Supreme Court sustained the validity of the Commission's action and the soundness of the Commission's finding contrary to the position of the protestants, namely, that there was no absolute requirement under the Interstate Commerce Act that ex-barge grain traffic should and must receive the same out-bound proportional rates as the ex-rail traffic enjoys.

And following the statement made by the Commission in its original report, that the record was not adequate for it to determine what the proper level of rates should be to govern this ex-barge grain traffic, the Supreme Court's opinion was narrowed o the proposition that the Commission, based upon the record t then had, was not at fault in finding that the proposed tariffs were not unlawful based upon the legal proposition advanced by the protestants.

Following that decision of the Supreme Court, petitions ere filed with the Commission by these present plaintiffs asking hat the proceedings be reopened for the purpose of providing a ecord upon which the Commission could, if it should deem fit, determine whether this particular traffic should enjoy an out-bound ate level lower than the local rate which the carriers had roposed.

Additional evidence was taken and the Commission; in Februry of this year, issued its report which is now the subject of e present suits.

I take it that the issues before this Court in this proceeding are hether or not the report of the Commission provides a rational sis for the conclusions that it reaches, and whether or not the identiary finding of the Commission upon which its ultimate nclusion rests has substantial support in the record.

And that is important, as the Commission also deemed it important in the preparation of its report, to very clearly and probly superficially advise the Court as to what the real rate situion is with respect to the movement of grain.

Grain comes into Chicago by various modes of transportation, principally by rail, by lake, by barge, and by truck.

On the out-bound movement of grain from Chicago——

Judge EVANS. That means east, I suppose?

Mr. KUNKLE. East of Chicago, to destinations in what is known as Official Territory, which itself is divided into Central Freight Association Territory, Eastern Trunk Lines Territory and New England Territory.

On ex-rail grain arriving at Chicago and subsequently moving to Eastern destinations, there were three levels of proportional rates applicable upon that Eastern movement based upon the origin of the grain west of Chicago. These proportional rates were the Northwest proportional rate which, as its name indicates, are applicable to grain originating in the northwest; the Trans-Mississippi proportional rate which, so far as the Central Freight Association Territory is concerned, varied from that of the Northwest proportionals, applied on grain originating in the Southwest Territory generally speaking; and the Illinois proportional which was applicable on grain from points in Illinois.

As I say, to destinations in Central Freight Association Territory, the rail proportionals out-bound varied as between the Northwest, Trans-Mississippi, and Illinois, notwithstanding that the identical service was involved in the movement from Chicago to a point in Central Freight Association Territory, and there
299 would be a different rate on that movement out-bound depending upon the western origin of that grain.

On points in Eastern Trunk Lines Territory and New England Territory, the same proportional rate was applicable regardless of origin.

The rates on grain had been fixed and prescribed in reference to the over-all movement of the grain from country gathering points, through the primary and intermediate markets, to ultimate destination. The combined rate on grain moving by lake to Chicago and thence by rail to Eastern destinations, involves a three-factor rate; one, the rail rate to the head-of-the-lakes; the shipping charges by boat to Chicago; and the rail rate out of Chicago.

In the far western territory there are three-factor rates, being the gathering rates to the first market, and then the rate to the primary market, and then the rate to the Eastern destination. These rates have been considered by the Commission and established in numerous proceedings. The Commission has undertaken an extensive investigation of the grain rate structure and in the course of many years the Commission has developed a rate structure applicable to all-rail traffic which has been applied to all movements of rail grain.

In the course of, or rather, at the beginning of the
300 movement of rail grain by barge into Chicago, which I think commenced in 1933, the out-bound proportional rail tariffs had never been devised to cover that type of movement. The result was, that because certain tariffs of proportional rates pro-

vided that the proportional rates should be applicable upon grain arriving at Chicago by boat, which at that time contemplated lake boat, this barge grain was subjected to the rail proportional rates out-bound from Chicago.

In other words, grain originating at Illinois points was given the benefit of the proportionals applicable of rail grain that originated at Northwestern points, and that would be a different proportional when destined to Central Freight Association Territory than the rail grain which originated at comparable points in Illinois.

The result of that anomalous situation which arose was that there was a disparity in the grain rates from points in Indiana and Illinois to Central Freight Association Territory and to other Eastern points; that there was a disruption of the whole scheme under which these rates had been prescribed and developed by the Commission, and therefore, for that reason, the Commission—as one of its reasons, the Commission held that the ex-barge grain was not, as a matter of law, entitled to identical rates that the rail grain received.

301 Judge IGOE. What was the reason that they were not entitled to that?

Mr. KUNKLE. Because it made the combination of rail-barge rates, as compared with the all-rail rates from various origin points in Indiana to Central Freight Association Territory and any Eastern destinations, out of line with the general scheme of the rate structure which the Commission had adopted to cover these movements when moving East by rail.

In other words, it developed that the rate where the combination barge to Chicago rate and the rail rate beyond Chicago, would be a less rate than the all-rail rate from an origin substantially east of the barge origin. In other words, you would have what is called numerous extra fourth-sections departures; a lower rate for a longer distance.

Judge IGOE. What is wrong about that?

Mr. KUNKLE. Well, in other words, you pay more for a shorter haul than you do for a longer haul. In other words, Morris, Illinois, for example, to take a point in Central Freight Association Territory, the total mileage of the barge plus rail is substantially greater than from a point east of Chicago to the same destination, and yet the Morris barge-plus-rail rate would be less than the shorter all-rail haul.

302 Judge IGOE. In other words, if you want to get the benefit of good barge rates you should live in Morris, Illinois.

Mr. KUNKLE. Yes; and if you want to be placed at a rate disadvantage, live one hundred miles east of Morris and have to pay more to get your grain to the same destination.

Judge IGOE. Why should we penalize the people that live in Morris?

Mr. KUNKLE. It is not penalizing the people that live at Morris, it is penalizing the people that live east of Chicago who must pay more for less service. As I say, that is simply an example of what the application of these proportional rates to those barge rates was accomplishing: It was breaking down the whole grain rate structure.

Now, the Commission in its report that is here under consideration finds that a certain level of rates applicable to ex-barge grain traffic, less than the local rates which the rail carriers wanted to put into effect, but yet higher than the ex-barge rail proportional rates, would not be unlawful or in violation of any of the provisions of the Act, and that it would not unduly influence the movement of barge traffic, and that the over-all result of that schedule of rates would provide a rate structure most equitable to everyone concerned.

303 Now, I apprehend that the Court's problem here in the final place is to find whether the ultimate conclusion of the Commission has rational basis in the report.

Judge EVANS. Doesn't it come to this, that under the schedules that are authorized the rates that may be charged, there is discrimination against water competition, water carriers?

That was the crux of the decision before and the Supreme Court voided it or reversed it on the theory that the Commission had not yet ruled on the question fully. But the law was enacted, only generally in the first instance but more specifically was this, that there should not be discrimination against water competition. Grain that is being hauled out of Chicago east has certain charges, call them what you wish, finishing or what not, but what they are doing is to charge more if the grain comes to Chicago by water than if it comes by railroad. Likewise they except water on the lakes, but in substance when you get down to it it is this water competition of the Illinois Drainage District or the river.

Can you possibly uphold this rate except by saying that this is not a descrimination against the river on grain that is brought in by water, fresh water?

Now, to make long speeches in your argument to show that
304 after all one hundred bushels of wheat that was brought in by barge ought to pay more to go from Chicago to New York, is just the same, does absolutely the same in favor of the railroads as you are doing to the lake competition over the barge line.

Mr. KUNKLE. What you say is true, your Honor, if you consider merely the eastern leg of one transportation service.

Judge EVANS. Well, that is what the rate is, isn't it?

Mr. KUNKLE. Yes; but with the fixing of that rate, being a proportional rate, it partakes of the inherent characteristics of a proportional, namely, a portion of a through rate.

Judge EVANS. Now, that argument was made before and rejected and we were reversed; and I felt at first that it must be we did not understand it. Then upon a more thorough reading of Judge Jackson's opinion it rather seemed to me that it was because it was more or less tentative, had not yet reached finality, and they upheld it. But if you just remove all the form and verbiage and get right down to it, what is there other than a discrimination against a man who has a bushel of wheat that has been brought in by water, over the railroad?

It may be we have got to go still further, but just the same the ultimate effect is a discrimination against water competi-
305 tion in favor of the railroad competitor out here, and not the Great Lakes competitor.

Now, that is bothering me and I cannot get at the remedy. We had it so clear the time before, I thought it was clear, and then we were reversed. Now, that is what I have got to be enlightened on before I can say that this rate should be upheld.

Mr. KUNKLE. While we speak of the rate out of Chicago, what the Commission is dealing with is the rate from origin from, say, from a point west of Chicago, and what the total rate will be to transport a given shipment to its ultimate destination in the East.

Now, if the rate by barge to Chicago on a given shipment, plus what the Commission says is a reasonable rate for rail movement on that shipment to its final destination, if the sum of those two rates is less than it costs some other shipper to ship by rail to Chicago and then to the same destination by rail, the discrimination if any exists—and I won't call it discrimination—but the disparity, if any, which exists is in favor of the barge-rail shipper.

Judge IGOE. What is wrong about that?

Mr. KUNKLE. Nothing. The Commission recognizes that in the rate prescribed.

Judge IGOE. Why do you penalize him?

Mr. KUNKLE. We don't penalize them. In other words——
306 Judge IGOE. That is the effect of it.

Mr. KUNKLE. The rates the Commission prescribes on the over-all makes it cheaper for a shipper to ship by barge and rail than for another shipper to ship all-rail.

Judge EVANS. He naturally has that right because of the rate by barge to Chicago.

Mr. KUNKLE. As to the quantity of that disparity that he should have, it seems to me that that is a matter for the Commission. Now, the Commission——

Judge EVANS. That is where we differ, and that is where I find it hard to follow you. Only by discriminating against the water competition by adding an extra rate from Chicago on can you effectually, as you say, equalize the rates, the total over-all rates; and only when you do that can this be accomplished by picking out the water competition and adding to the grain which he can haul into Chicago, a sum that will make it unprofitable or inadvisable, maybe, to ship by water from a point in Illinois to Chicago. Now, I just cannot see how that can be called a nondiscrimination against the water competition.

Mr. KUNKLE. In this respect: the Commission in this case has found that to apply the local rate on to these shipments, as the rail carriers would do, would affect the flow of traffic and be an unreasonable thing.

307 Now, the Commission thereupon proceeded——

Judge EVANS. Now, the railroad specifically, by revising the rates, as it can and does, intends to divert business from the water.

Mr. KUNKLE. No; the Commission found exactly the opposite They said it would not divert it to any substantial degree.

Judge IGOE. That is, if you apply the local rates to that product out of Chicago?

Mr. KUNKLE. No; it meant diverting it from the barge to the rails.

Judge IGOE. If you applied that local rate from here East, it would divert it from the barge to the rails.

Mr. KUNKLE. Yes. I think that while the Commission did not specifically say so in the second report, I think that is a fair inference to be gathered from it.

Judge IGOE. Yes; but if you gave the barge-carried product the benefit of your proportional rate from here East, why that would not divert any traffic from the barge line.

Mr. KUNKLE. Benefit of the rail proportionals?

Judge IGOE. Yes.

Mr. KUNKLE. No; it would not divert any traffic.

Judge IGOE. Of course not.

Mr. KUNKLE. But the Commission found that there were

308 certain characteristics of the service, as between all-rail and barge-rail, which justified a different rate treatment.

Judge EVANS. They justified it as sort of an economic theory of distribution over the two hauls; one west into Chicago and one east from Chicago on. But they ignored the fact that in so doing they are discriminating against water competition.

The haul from Illinois to Chicago is a certain amount, we will say, 20 cents; and from Chicago east it is 25 cents. Now, they say, in order to equalize the shipment, not only here but farther west, we will add to the man who is charged only 20 cents, 5 cents more or two cents more, or one cent more, I don't care what it is, only one cent more, and in so doing I cannot see how possibly he was not discriminating against the fellow that shipped by water out here.

You say, taking into consideration all the circumstances, he has got a pretty low rate from Illinois to Chicago from central Illinois, therefore I will just add something to him to put him on an equality with the fellow shipping from the Northwest, or somewhere else, all by rail, who hasn't the benefit of water competition.

So what you have is, you are adding to the burden of the
309 water and that, I take it, is a Constitutional prohibition against even the power of the Interstate Commerce Commission.

Mr. KUNKLE. I don't think that your Honor has stated the reasons that guided the Commission in arriving at this conclusion. I think the report on this is very clear, both as to the Commission's reasoning and as to why it applies a different rate on this traffic than it does to all-rail traffic.

May I call your Honor's attention to the report of the Commission in the Inland Waterways complaint at page 32, where the Commission says this:

"Where, as here, ex-rail and ex-lake proportionals or specifics reflect average circumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences."

And then it enumerates categorically what those differences are. You see, the Commission is properly treating this not as just the
310 eastern leg of the journey—if that were true I can see the force of your Honor's comment—but they treat this, as they necessarily have to treat it, as one through act of transportation.

Now, whether that is performed by one or two rail carriers, or whether the through act is performed by a water carrier and a rail carrier, or a lake carrier and a rail carrier, it is the over-all picture, the over-all service and the characteristics of the service upon which the Commission has differentiated in prescribing the rates. But so long as the Commission adopts proper differentials, its decision is within its competence, and that is exactly what it has done here.

It says that the barge-rail transportation is different than the all-rail transportation. The characteristics of the service are different, and therefore a different rate can be applied to it; not to just one leg but to the over-all transportation service, without a violation of the law and in consonance with the law, because the law specifically recognized that there is a differential in rates between water-rail and all-rail.

May I call your Honor's attention to Section 307 (d) of the Transportation Act of 1940, which provides that

"The Commission may and shall, whenever deemed by it to be necessary or desirable in the public interest, after full hear-
311 ing upon the complaint" and so forth, "establish through routes, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property by common-carrier by water, or by such carriers and carriers by railroad, maxima or minima, maximum and minimum to be charged and the combination of such rates, fares and charges, and the terms and conditions under which such through routes shall be operated. In the case of a through route where one carrier is a common-carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between the all-rail rates and the joint rates in connection with such common-carrier by water."

Now, there, we submit, is statutory affirmance of the right of the Commission in dealing with all-rail on the one hand and barge-rail on the other, to make a differential in the charges.

Now, the mere fact that one may be a joint rate by rail and water, and one transportation may be a combination of pro-
312 portionals, that is merely a method of rate making, and it does not affect the inherent characteristics of the through transportation service.

Judge EVANS. Then the same Section reads:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof," and so forth.

The idea was that they shall administer and recognize and preserve the inherent advantages of each. The inherent advantage of this locality in Illinois of water competition is, by the Interstate Commerce Commission, being destroyed or defeated so that
313 there would be, under the guise of a differential, or what they call a just rate, a loading up of this advantage that naturally lies with the water competition, by adding to it a freight rate from Chicago on. That is the way it strikes me.

Mr. KUNKLE. Well, I think your Honor's proposition as to that has been answered by the Supreme Court. The question of the effect of the National Transportation Policy was vigorously argued to the Supreme Court. The Supreme Court held that that did not prevent the Commission from prescribing a different level of proportionals applicable to ex-barge traffic than to ex-rail.

Now, I think it can be demonstrated quite convincingly from Table 4 or Table 5 in the Appendix to the Commission's report, that what the Commission was considering and properly considered, was the over-all transportation service and the combination of charges covering that service.

Now, Table 5 appended to the Commission's Report shows the barge rates to Chicago, and the average barge-rail combination via Chicago under the present rate, which was the application of the proportionals; under the proposed rates, which is the application of the locals; and under the prescribed rates, which is the scale the Commission fixed. And that table clearly demonstrates that the combination of the rail, the barge-rail rate under the proportional prescribed, considering the transportation,
314 from origin to ultimate destination, is more favorable than the all-rail combination.

Therefore, I say to the Court that if the reasoning of the Commission in arriving at the conclusion it did as to the proper level of these rates, is based upon evidentiary facts set out in the report, and we submit those facts are sustained by the record in this case, therefore I say that this order of the Commission is unassailable.

Judge EVANS. We come to the very interesting situation here, that apparently this Court as it now stands, three members of the Court, not counting Judge Jackson as a majority—there are four members who were opposed to you there. Maybe your opponents are asking them for a new deal, just on the chance that they may draw an ace the next time. But we want the Commission to so treat the water competition in a manner that tends to give it full advantage of its inherent quality and superiority. And we still feel that way.

I think there is only one way to do it, and in view of the reasonableness of your presentation, the only thing is to take it up again

and thresh it out once more. This time they will have gained something; you haven't got the differential which you said was so important. It is not merely as important this time as it was
315 the last time. You have yielded something.

Mr. KUNKLE. I think the Commission based it upon the supplemental record which it had before it; weighed the facts——

Judge EVANS. Yes; that is the argument. That is an argument in favor of the validity of its order. But I think the fact is, whatever you may have said before as to the righteousness of your judgment, you found they were not as righteous as you thought, but you have revised them and you do not discriminate against the water only about one-fourth as much as you previously did. Consequently, they have another hold on you. In other words, they have got about five of your Commissioners, and that is a majority this time.

Mr. KUNKLE. There are five. There was substantial dissent. I do not know whether it is different now from the last time.

Judge EVANS. Now, maybe that indicates they have thought that out better and that greater weight should be given to the decision, because every one of them is in there now this time. It was one thing, at least.

Now, I do not think there is much to be gained by further argument on the matter. Maybe it is just plain stubbornness——

Mr. KUNKLE. I was going to suggest to your Honor, in
316 view of the changed condition in the Supreme Court, it might be equitable to this extent to let the other side lead the way this time instead of us.

Judge EVANS. Well, that is all right, but that would be paying so very little attention to the opinion of the lower court. After all, we take ourselves more seriously than either the counsel or the Supreme Court. We rather think we ought to decide it as we see it.

Mr. KUNKLE. Exactly. I agree with you perfectly.

Judge EVANS. And this case is no different from any other. If we thought that you were right, although our opinion may not be worth much, we would so say and let them take the appeal.

Mr. KUNKLE. I was only saying that facetiously, your Honor. I would not suggest you would do anything other than decide the case the way you thought it should be decided.

Judge EVANS. You may present the findings, and you get together, gentlemen, and then submit them to your adversary and do it as promptly as possible.

Mr. HAYES. Well, it should be very promptly.

Judge Evans. Send them to your opponent before you send them to us.

Mr. Hayes. We will do that.

Mr. Kunkle. Your Honor, if by any chance we should
317 not be able to get together on the proper findings and conclusions, may we submit them separately?

Judge Evans. Yes.

Mr. Knowlton. I take it by "promptly" you will allow for mail time between here and Washington.

Judge Evans. We will allow you two or three weeks. This is a matter that ought to be disposed of, I think. You can get that pretty fast; you ought to be able to get to the Supreme Court pretty fast. You have an absolute right to go there.

Judge Igoe. What are you suggesting as to the time in which you could get them in?

Judge Evans. Can you get them in and ready for us in two weeks?

Mr. Hayes. Yes, your Honor; probably before that.

Judge Evans. Two weeks, then. And then you may have ten days as a reasonable time in which to go over them and approve them or to point out the ones you are going to except to.

And that being so, we will now recess.

Which was all of the evidence offered and all of the evidence received and proceedings had on the hearing of said cause.

318 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 45–C–865

A. L. Mechling, Doing Business Under the Trade Name and Style of A. L. Mechling Barge Line, plaintiff

vs.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant

No. 45–C–866

Inland Waterways Corporation, plaintiff

vs.

United States of America and Interstate Commerce Commission, defendants.

No. 45–C–1020

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND THE WAR FOOD ADMINISTRATION, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

CERTIFICATE

I hereby certify that the above and foregoing is a full, true
319 and accurate transcript of my original shorthand notes taken upon the hearing of the above-entitled matter, on the 16th day of October A. D. 1945, at ten o'clock A. M.

HARRY A. HARNDEN,
Official Court Reporter,
United States District Court,
Northern District of Illinois.

321 In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action File No. 45–C–865

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, PLAINTIFF, *vs.* UNITED STATES OF AMERICA, DEFENDANT

INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

Civil Action File No. 45–C–866

INLAND WATERWAYS CORPORATION, PLAINTIFF, *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil Action File No. 45–C–1020

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES AND THE WAR FOOD ADMINISTRATOR, PLAINTIFFS, *vs.* UNITED STATES OF AMERICA, DEFENDANT

INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

Findings of Fact and Conclusions of Law

Nov. 26, 1945

322 This cause coming on to be heard and the court having heard arguments of counsel and being advised in the premises now makes the following

FINDINGS OF FACT

(1) A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, plaintiff in Civil Action No. 45 C 865, hereinafter called "Mechling," is a common carrier by water subject to Part III of the Interstate Commerce Act operating a barge line on the Illinois River and Waterway and the Mississippi River, by means of which he transports grain in interstate commerce from various ports on said waters to Chicago, Illinois, for reshipment at Chicago to interstate and foreign destinations located easterly therefrom.[1]

(2) Inland Waterways Corporation, operating Federal Barge Lines, plaintiff in Civil Action No. 45 C 866, hereinafter referred to as "Federal," is a common carrier by water subject to Part III of the Interstate Commerce Act operating a barge line on the Illinois River and Waterway and Mississippi and Missouri rivers, by means of which it transports grain in interstate commerce from various ports on said waters to Chicago for reshipment at Chicago to interstate and foreign destinations located easterly therefrom.

(3) The Secretary of Agriculture of the United States, one of the plaintiffs in Civil Action No. 45 C 1020, is a duly appointed cabinet officer of the President of the United States of America in charge of the Department of Agriculture, and is authorized to make complaints to the Interstate Commerce Commission, hereinafter referred to as the Commission, with respect to rates, charges, tariffs, and practices relating to the transportation of farm products and to prosecute the same before the Commission and to appear as a party in original and appellate judicial proceedings involving the Commission's determination. The War Food Administrator, the other plaintiff in Civil Action No. 45 C 1020, is a duly appointed officer of the United States similarly authorized.

[1] Mechling has been certificated as such by the Interstate Commerce Commission in collateral proceedings.

Said War Food Administrator is also authorized to formulate and carry out a program designed to furnish a supply of food adequate to meet military, civilian, and foreign requirements, both for human and animal consumption and for industrial uses, and to take all appropriate steps to insure the efficient and proper disposition of the available supply of food.

323 (4) Grain is also transported to Chicago, Illinois, by rail[2] and by lake steamer for reshipment to interstate and foreign destinations lying easterly of Chicago.

(5) The Western Railroads so transporting grain to Chicago serve, among many others, most of the origins served by the barge lines in this grain traffic to Chicago and compete with the barge lines for the grain brought to Chicago.

(6) The lake steamers bring grain to Chicago from various ports on the Great Lakes, of which Duluth, Minnesota, is the most important in respect to domestic grain. At times, said lake steamers also bring substantial quantities of foreign grain to Chicago, both from Canada and from other continents, said latter grain being imported via the St. Lawrence Waterway.

(7) The grain so brought to Chicago by rail, lake steamers, and barge is transported therefrom to interstate and foreign destinations lying easterly thereof by the Eastern Railroads[3] which were the respondents and defendants in the proceeding before the Commission known as Grain Proportionals, Ex-Barge to Official Territory, I & S Docket 4718, in which was issued the order sought to be enjoined in this cause. The incoming lines of the Western Railroads, and the plaintiff barge lines, are connecting lines of carriers, as defined by Section 3 (4) of Part I of the Interstate Commerce Act, of the Eastern Railroads via which said grain is shipped out of Chicago.

(8) Typically, this grain is temporarily stored on arrival at Chicago in elevators from which it is delivered into the cars of the Eastern railroads for out-movement to the east. The movement of grain from the west through the Chicago elevators to the east

[2] The Western Railroads, whose lines end at Chicago, include the Alton Railroad, Atchison, Topeka & Santa Fe Railroad, Chicago, Burlington & Quincy Railroad, Chicago & North Western Railroad, Chicago, Great Western Railroad, Chicago, Milwaukee, St. Paul & Pacific Railroad, Chicago, Rock Island & Pacific Railroad, Illinois Central Railroad, New York Central Railroad and Wabash Railroad.

[3] The Eastern Railroads include, for example, the Baltimore & Ohio Railroad Company, Erie Railroad, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, and the Chesapeake and Ohio Railway Company.

is one of the conspicuous national streams of interstate commerce. Chicago is the greates grain reshipping point in the world.

(9) Grain moving to and stored at Chicago in this stream of commerce is sold on the basis of delivered prices to Chicago dealers. The cost of the inbound transportation (as represented by freight rates and other incidental charges) is borne by the producer or shipper of inbound grain. The net price received by such producer or shipper varies inversely with the amount of the inbound transportation cost so that the benefit of any lowered cost of inbound transportation accrues directly to the producer and inbound shipper. The delivered prices so paid by Chicago dealers are uniform, regardless of the mode, cost or length of inbound transportation, so long as the grain purchased is treated on a parity with all other grain in respect to transportation charges assessed for outbound movements.

Appendices to the reports of the Commission in the proceeding in which was entered the order sought to be enjoined in this cause show by years the receipts and shipments of grain from Chicago according to species and mode of transportation. (246 I. C. C. 353, 383; 262 I. C. C. 7, 41) For the period from 1933, when movement of grain by barge to Chicago was resumed upon completion of the Illinois Waterway, through the first ten months of 1943, the totals of such yearly figures are as follows:

324 GRAIN RECEIVED AT AND SHIPPED FROM CHICAGO

GRAIN RECEIPTS (IN THOUSANDS OF BUSHELS)

	By rail	By barge	By lake	Total
Corn	773,897	85,191	23,170	882,258
Wheat	251,419	12,024	18,063	281,506
Oats	210,616	2,470	8,237	221,323
Soybeans	97,500	2,948	120	100,568
Total grain	1,333,432	102,633	49,590	1,485,655

GRAIN SHIPMENTS (IN THOUSANDS OF BUSHELS)

Corn	288,100	200	272,077	560,377
Wheat	158,402	888	83,376	242,666
Oats	177,574	368	17,263	195,205
Soybeans	22,200	.....	17,838	40,038
Total grain	646,276	1,456	390,554	1,038,286

The tariffs and the trade treat soybeans as grain, and as used herein grain includes soybeans. Other kinds of grain are received at Chicago besides that shown in these figures.

The grain received at Chicago by lake inbound comes principally from Duluth, Minn., although during the period covered by the above table substantial quantities of foreign grain were also received via lake at Chicago. The lake shipments from Chicago outbound go primarily to Buffalo, N. Y., for reshipment by rail therefrom to destinations easterly thereof.

(10) All grain of like kind and grade comes to a common market value at Chicago, regardless of the cost, mode or length of inbound transportation. Such grain is sold by the Chicago dealers delivered at Eastern Destinations at the price represented by such Chicago market value, plus the cost of transporting such grain to said Eastern Destinations. The Chicago dealers sell the grain so purchased from the west at delivered prices based on such Eastern Destinations as Philadelphia, Pa., New York City, N. Y., and Boston, Mass. As a consequence, the reshipping rates are borne by the Chicago dealers. Such Chicago dealers are not able to bear or absorb greater outbound reshipping charges on grain brought to Chicago by a particular mode of transportation (such as those prescribed by the Commission in its order herein complained of), than they bear or absorb on grain brought
325 to Chicago by other modes of transportation unless such grain has been purchased by them at a price reflecting a discount of similar amount to the amount by which the reshipping rate on the particular grain is greater than on other grain.

(11) The principal escape of all grain from Chicago to the east is via rail.[5] That is the only escape during a period of five months in the winter when navigation on the Great Lakes is closed. That is also the only escape at any time of year for very substantial volumes of grain sold to processors intermediate between Chicago and Buffalo. In the case of rail-arrived grain, a substantial volume is disposed of by means of local sales at Chicago to processors there located. There is little, if any, sale at Chicago of the barge-arrived grain for local consumption or use, which fact is due to the charges made by railroads for switching the barge-arrived grain from waterfront elevators in Chicago to local grain processors.[6] Grain cannot come to Chicago by barge in substantial volume unless it can find escape to the east.[7]

(12) By far the most important destinations for this grain east of Chicago are in New England and Eastern Trunk-Line territories, which include all territory east of a line drawn northward and southward through Pittsburgh, Pa., and Buffalo, N. Y., north of the Potomac River. For convenience, this territory is collectively referred to herein as "Eastern Territory" and destinations therein are collectively referred to as "Eastern Destinations." While some of this grain initially moves from Chicago to intermediate destinations west of said Buffalo-Pittsburgh line, for convenience called "Central Territory," it is nevertheless sold on the

[5] See footnote 4, supra.

[6] "At Chicago, the elevators are generally served by both rail and water, but local processors there can obtain rail delivery of barge grain only by the payment of a [rail] switching charge ranging from 2.25 to 4.5 cents per 100 pounds." 262 I. C. C. 7, 24.

[7] "Barge-rail grain is marketed but not processed at Chicago." 262 I. C. C. 7, 22.

basis of delivered prices at destinations east thereof because it can be and is sent on from the intermediate destinations under transit to destinations in Eastern Territory, and the whole transportation movement east from Chicago paid for on the basis of the rate applicable to the movement from Chicago to final destination in Eastern Territory.[8] That rate is the only rate east from Chicago which then affects the transaction.

(13) Presently, and for many years, this grain arriving in Chicago by rail, lake, and barge has been transported by the Eastern Railroads in carloads from Chicago to all Eastern Destinations at the same basis of reshipping charges, which basis of
326 charges is illustrated by the charge of 26 cents per hundred pounds from Chicago to New York.[9] These charges are called in the last report of the Interstate Commerce Commission (262 I. C. C. 7) "proportionals or specifics." Whatever they are called, and in whatever form they are published and exacted, they are the charge demanded and received by the Eastern Railroads for their service in transporting east from Chicago grain which has had an antecedent haul by rail, lake steamer, or barge. They have been made without reference to the length of inbound haul by rail, barge, or lake. A descriptive name, (occurring in some rail tariffs) is "reshipping" rates or charges, and they will be so called herein.[10]

[8] "In this proceeding, the rates to trunk-line and New England territories are by far the more important, as marketers and processors in central territory can and do transit under such rates." 262 I. C. C. 7, 15.

[9] Rates are herein stated, as in the rail tariffs and the Commission's report, in cents per hundred pounds.

[10] There is but one level of reshipping rates from Chicago to Eastern Destinations (which are by far the more important here) and it is applicable from Chicago to all Eastern Destinations, whether the grain arrived in Chicago by rail, lake, or barge—and regardless of the origin of the grain west of Chicago. To the less important Central Territory destinations there are three levels of ex-rail reshipping rates dependent on the origin of the grain, each level applying to grain received from a particular origin territory, regardless of the length of the inbound haul. As to grain received from two of such origin territories, the ex-rail and ex-barge reshipping rates east from Chicago are identical. That is to say, there is an identity of rail reshipping charges out of Chicago on grain, regardless of whether it arrived in Chicago by rail, lake, or barge, as to all grain originating in the northwest (Northwest Territory—which includes all origins in North Dakota, South Dakota, Minnesota, Wisconsin, the Upper Peninsula of Michigan, Montana, Wyoming, Idaho, Oregon, Washington, and certain Canadian provinces). To these Central Territory destinations there is also the same identity of rail reshipping charges out of Chicago on grain, regardless of mode of inbound transportation, as to all grain originating west of the Mississippi (Trans-Mississippi Territory, which includes all origins west of the Mississippi other than Northwest Territory). As to grain originating in Illinois, the rail reshipping charges east from Chicago on rail-arrived grain (to Central Territory) differ from the other two reshipping levels just mentioned; but said reshipping level to Central Destinations is not applicable to barge-arrived grain from Illinois. As to such barge-arrived grain, the reshipping rates are the same as the reshipping rates on the ex-lake grain which in turn are the same as the reshipping rates on ex-rail grain from the Northwest. Those rates are in a few cases lower, but as a general level as high (and, to most such Central Territory destinations, higher) than the rail reshipping charges east from Chicago on the grain arriving there by rail from Illinois origins. These three different levels of reshipping charges from Chicago (to Central Territory) are not an adjustment of these outbound rates from Chicago which vary with the length of the inbound haul. Thereunder, grain from Iowa, just across the Mississippi River, takes the same reshipping rate out of Chicago to Central Territory destinations as grain from the Rocky Mountain region; and grain from Milwaukee, Wis., takes the same reshipping rate from Chicago to Central Territory destinations as grain from Canada.

(14) At the same times, the Eastern Railroads have published so-called "local" rates for transporting grain east from Chicago, considerably higher than the reshipping basis, and appli-
327 cable on grain that has had no antecedent transportation to Chicago but originating in the Chicago switching district, called "local" grain. The local rate level is uniformly higher to all Eastern Destinations by 8.5 cents per hundred pounds, than the reshipping rate level. The local rate level is illustrated by the local rate from Chicago to New York of 34.5 cents.[11]

(15) By a previous order, 248 I. C. C. 307 (entered on evidence taken before the Transportation Act of 1940 became effective), the Interstate Commerce Commission approved the Eastern Railroads putting into effect a proposal to cancel the application of the reshipping basis of rail charges as to all grain arrived in Chicago via the inland waterway by barge (called "ex-barge" grain) without changing the reshipping basis of rail charges on grain arrived in Chicago by rail, or by lake (called, respectively, "ex-rail" and "ex-lake" grain), and leaving no rail rate applicable from Chicago to Eastern Destinations on ex-barge grain but the local rates, uniformly higher than the reshipping charges by 8.5 cents to all Eastern Destinations.[12] At the time the evidence was taken on which said order was entered, this transportation of grain to Chicago via barge was not subject to the Interstate Commerce Act and the Commission had held that said Act did not prohibit discrimination in rates and charges by railroads against a connecting unregulated water line, since at that time the said Act did not apply to port-to-port transportation by barge lines, and the prohibited discrimination in rates and charges by railroads against connecting lines embraced only discrimination against a connecting line subject to Part I of the Interstate Commerce Act.[13] That order was contested in this Court and the Supreme Court of the United States, the latter court sustaining the Commission's order. The Eastern Railroads did not avail themselves of the said permission to make their said proposal effective.[14] After said proceedings in this Court and in the Supreme Court of the United States,[14a] the Commission on petition of interested parties reopened

[11] They are also applicable, for example, on grain that has lost its reshipping privilege, as lying too long a time in Chicago without reshipment, and to grain arriving in Chicago via truck.

[12] To destination in Central Territory the local rates exceeded the reshipping rate levels by varying amounts ranging from a few cents to 7.5 cents.

[13] 246 I. C. C. 353, 363, and cases cited.

[14] "Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates, which, under the Commission's decision leaves them open to possible recovery of reparations." Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671.

[14a] The history of the proceedings in which was entered the order sought to be enjoined in this cause may be summarized as follows: The proposal of the Eastern Lines to make the reshipping basis from Chicago to the east inapplicable to ex-barge grain arriving at Chicago over the Illinois Waterways was published in tariffs filed with

the case by order set forth in the margin [15] and on February 13, 1945, entered a further order.[16] Therein and thereby the Commission disapproved and ordered canceled the said rate proposal. No

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the Commission to become effective October 15, 1939. Various shipping inter-
328 ests and Federal filed protests against the proposal alleging that, if made effective, it would violate Sections 1, 2, and 3 (1) of the Interstate Commerce Act. Thereupon, by order of October 14, 1939, said proposal was suspended by the Commission and an investigation instituted into the lawfulness thereof in a proceeding known as Grain Proportionals, Ex-barge to Official Territory, I. & S. Docket No. 4718. Hearings in that investigation were complete in January 1940. On July 31, 1941, the Commission, Division 2, issued its report and order (246 I. C. C. 353) and found that the proposal had not been shown to be unlawful, that the suspension order should be vacated, and the proceeding discontinued as of August 30, 1941. Thereafter, upon petition of the plaintiffs and others, the Commission granted reconsideration (but denied rehearing) (248 I. C. C. 307) in which it stated that the proposed schedules had been shown to be just and reasonable and had not been shown to be otherwise unlawful, that the suspension order should be vacated, and the proceeding discontinued as of December 22, 1941. Thereafter, various parties and interests, including the plaintiffs in this cause and others, as plaintiffs or intervening plaintiffs, filed proceedings in this Court seeking to enjoin the said order of the Commission of December 1, 1941. This Court issued the injunction as prayed. On appeal, the Supreme Court of the United States reversed this Court and held that the order entered by the Commission in the proceeding before it involved no approval of proposed schedules and that the dismissal of the proceedings was within its authority under the circumstances of the case.

[15] The order of the Commission reopening the case before it for further hearing reads:

ORDER

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 13th day of July, A. D., 1943

I. & S. No. 4718.

Grain Proportionals, Ex-Barge to Official Territory

It appearing, That in the report of the Commission on reconsideration in the above-entitled proceeding, 248 I. C. C. 307, the Commission said that "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations."

It further appearing, That motions requesting leave to file petitions for rehearing and for an order fixing specific reshipping rates on ex-barge grain, together with such petitions, have been filed by Cargill, Incorporated; Continental Grain Company, Norris Grain Company; Rosenbaum Brothers; Santa Fe Elevator Corporation; and A. L. Mechling, doing business as A. L. Mechling Barge Line; and that said petitioners request rehearing for the purpose of presenting evidence which will permit the Commission to prescribe and fix reshipping rates on ex-barge grain predicated on the particular circumstances and conditions which surround its transportation;

It further appearing, That the said petitions in effect are complaints which bring in issue the lawfulness of rates applicable on the through movement of the traffic considered in the instant proceeding; and that the record therein may be of assistance in determination of the issues presented by said petitions.

329 And it further appearing, That the said petitions and replies thereto have been considered in the light of the record herein and the opinion of the Supreme Court of the United States in Interstate Commerce Commission, et al. v. Inland Waterways Corporation, et al., decided June 14, 1943.

It is ordered, That this proceeding be, and it is hereby, reopened for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by railroad of ex-barge grain, in carloads, from Chicago, Ill., and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic, and (2) to determine what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by said A. L. Mechling, doing business as A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed.

And it is further ordered, That this proceeding be, and it is hereby assigned for further hearing on August 16, 1943, at 9:30 o'clock, a. m., at the Hotel Morrison, Chicago, Ill., before Examiner Fuller.

By the Commission

(SEAL)

W. P. Bartel,
Secretary.

[16] It was stipulated that this order is as reproduced at pages 15 and following of the complaint of A. L. Mechling herein. The "report" (but not the order which makes the said report, and prior reports of July 31 and December 1, 1941, a part of the order) is reported in 262 I. C. C. 7 and following.

one complains of that action. But by the same order the Commission prescribed a maximum basis of reshipping charges on all ex-barge grains from Chicago to destinations lying to the east thereof, that is higher than the basis of reshipping charges to be continued on ex-rail and ex-lake grain.[17] To all Eastern Destinations the prescribed reshipping rates on ex-barge grain are uniformly 3 cents higher than the reshipping basis on all ex-rail and ex-lake grain. To Central Territory destinations, except in a relatively few instances, the prescribed reshipping rates on ex-barge grain are higher than the reshipping basis on ex-rail grain from the same origin, and higher than the reshipping basis on ex-lake grain from all origins.

(16) The Commission found nothing requiring it to order a change in the present equal treatment of ex-rail, ex-lake, and ex-barge grain in respect of the rail reshipping charges to Eastern Destinations. It did not require the Eastern Railroads to put into effect at any particular time the said 3 cent penalty basis of rail charges that it approved against the ex-barge grain in favor of ex-rail and ex-lake grain.[17a] But the Commission found that said penalty rate relation on ex-barge grain was reasonable and otherwise lawful and made such finding and prescribed rate basis a part of its order.[18] By said order the Commission authorizes the East-

[17] The Commission made its findings a part of its order and found (emphasis supplied):

"2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the Eastern destinations considered herein, under sections 1, 2, 3(1), 3(4), 6(11)(b), and 15a(2) of the Interstate Commerce Act, administered with a view to carrying out the national transportation policy, will be those made differentially under the local rail rates which are or may be hereafter concurrently maintained from Chicago, as set forth below, with the customary differentials on the products and export traffic, and which are no less favorable to the ex-barge traffic, and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other.

Where local rail rate on grain is:

(Cents)
13–14
15–22
23–24
25–26
27–28
28.5 and over

Differential, ex-barge under local rail rates shall be:

(Cents)
1
2
3
4
5
5.5"

Said "prescribed ex-barge proportionals" (so prescribed by the Commission in terms of the higher local rates but in relation to the existing ex-rail and ex-lake reshipping charges) are uniformly 3 cents higher from Chicago to Eastern Destinations than what we have called the reshipping charges, which the Commission here calls "the present ex-rail and ex-lake proportionals or specifics," and which are, also, the present ex-barge reshipping rates.

[17a] "As the proposed schedules have not become effective because of the voluntary postponement by respondents of the effective date thereof, no order requiring establishment of the rates herein found lawful appears necessary at this time. An order will be entered requiring the cancelation of the proposed schedules, without prejudice to the filing of new schedules in conformity with the findings herein" (262 I. C. C. 7, 33).

[18] Complaint of Mechling, pages 53, 72.

ern Railroads to make said rate penalty effective, at their option and pleasure. Thereafter the Eastern Railroads on June 2, 1945, filed tariffs putting into effect the said prescribed penalty rate basis on ex-barge grain for the full amount of said 3-cent penalty, to become effective October 5, 1945, which tariffs recite on the face that they are "Issued in conformity with findings of the Interstate Commerce Commission in I. & S. Docket No. 4718 decided February 13, 1945," (which is the said order herein complained of) whereby, pursuant to said order, the reshipping rates from Chicago to Eastern Destinations will be increased by 3 cents on
331. ex-barge grain, while the reshipping charges remain unchanged on ex-rail and ex-lake grain.[19]

(17) Consequences of the Commission's order are as follows:

(a) On grain of like kind (including grain coming from identical shipping points west of Chicago that originate both ex-barge and ex-rail grain, and receiving the same terminal and transit service at and east of Chicago available to all ex-rail, ex-lake and ex-barge grain under the tariffs of the Eastern Railroads) said prescribed higher charge will be made for transporting the same from Chicago to Eastern Destinations if such grain arrived in Chicago by barge, but only the lower established reshipping charge will be made if it arrived in Chicago from the same origin by rail.

(b) On grain of any kind coming by rail or lake from any origin, the same established reshipping charge will be made for transporting the same from Chicago to Eastern Destinations, regardless of whether it is ex-lake from Duluth, or ex-rail from within a few miles of Chicago, and regardless of any other factual disparity between such ex-rail and ex-lake grain.

(c) All ex rail grain, wherever it comes from, and however short the inbound haul, will be transported to Eastern Destinations for three cents less than any ex-barge grain whatever.[20]

(18) The increase so prescribed in the reshipping charges on ex-barge grain relative to the reshipping charges east from Chicago on ex-rail and ex-lake grain would substantially lessen the barge-rail traffic via Chicago, and substantially decrease the volume of grain moving by barge to Chicago. The pertinent facts are as follows:

(a) Shippers of grain to Chicago from origins served by both rail and barge transportation to Chicago will have less incentive to ship grain to Chicago by barge, because when it comes to Chicago by barge, the reshipment cost east from Chicago to the same destination will be more than if it came to Chicago by rail.

[19] To destinations in Central Territory the changes in ex-barge rates shown in said tariffs vary in amount. They need not be stated in detail since the difference between the change in the rate basis to Central Territory and the change to Eastern Territory is one of degree only.

[20] Similar disadvantages in varying amounts is imposed on ex-barge grain to destinations in Central Territory.

(b) The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic.[21] One such cost deducted from the Chicago market price in order to arrive at the farmer's net price, is the cost of trucking the grain to the river. The Commission finds: "Where the deductions [from the Chicago price] are less on the barge than on the rail traffic the net price
332 to the farmer is correspondingly greater, the difference diminishing as distance from the waterway increases until it disappears altogether." (262 I. C. C. 7, 23) The diminishing difference is due to the increase in the cost of getting the grain to the river as distance from the river increases.[22]

Such rate differences, however, do not measure the commercial saving from barge transportation as against rail transportation.

As to rail-arrived grain the Commission finds:

"The net price to the farmer on grain shipped to the Chicago market [by rail] is usually determined by deducting the in-bound truck cost, rail rate, and the country elevator margin from the Chicago price" (262 I. C. C. 7, 16).

"So far as the rail carriers are concerned the grain originates at numerous so-called country grain elevators located throughout the origin territory requiring an in-bound truck haul from the farms ranging from only a few yards to about 10 miles, with a truck charge or cost ranging from 0.9 to 1.8 cents. The all-rail traffic requires only one intermediary between the farmer and the dealer at the primary market or gateway, namely, the country elevator operator, whose average margin is about 4.7 cents" (I. C. C. 7, 16).

[21] The Commission correctly so finds. 262 I. C. C. 7, 22-23.

[22] The Commission's report (262 I. C. C. 7, 39-40, Tables IV and V in Appendix A) shows the rates via rail and via barge from some barge origins to Chicago, from which may be computed the differences in such inbound rates as follows:

Origin	Inbound rates		Difference
	Via rail	Via barge	
Illinois:			
Morris	9.5	2.0	7.5
Seneca	9.5	2.25	7.25
Ottawa	10.0	2.5	7.5
La Salle	12.0	2.75	9.25
Henry	12.0	3.5	8.5
Lacon	12.0	3.5	8.5
Chillicothe	12.0	3.5	8.5
Peoria:	12.0	4.0	8.0
Havana	12.0	4.25	7.75
Naples	13.0	5.0	8.0
Missouri:			
Kansas City	16.0	9.3	6.7

As to barge arrived grain, the Commission finds:

"The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic" (262 I. C. C. 7, 23).

The trucking cost on the great preponderance of barge-grain traffic to the river ranges from 0.9 cent to 5.4 cents depending upon trucking distance (262 I. C. C. 7, 42).

"A trimming expense of 0.7 cent per 100 pounds is incurred in connection with the barge-rail grain. * * * The margin for these elevators at the Illinois barge origins averages about 2.68 cents. * * * Although the barge-grain from the Illinois origins does not move through the country rail elevators, it is generally purchased through the operators thereof, who are allowed the same margin as on the rail grain, namely, 4.4 cents" (262 I. C. C. 7, 22–23).

333 The elevator charges and dealer's margin at Chicago are the same as on transit rail grain, namely, 1.6 and 2.25 cents, respectively" (262 I. C. C. 7, 23).

These items make the commercial saving resulting from the use of barge transportation rather than rail transportation less than the difference between inbound barge and rail rates which are stated above in this note.

"Where the deductions are less on the barge than on the rail traffic, the net price to the farmer is correspondingly greater, the difference diminishing as distance from the Waterway increases until finally it disappears altogether" (262 I. C. C. 7, 23).

It finds further: "The primary interest of the Illinois farmer, having access to the Waterway is in the greater net price above referred to. The barge lines and the Waterway elevator operators and dealers are primarily concerned with the volume of traffic moving through their facilities." [23]

The farmers are also interested in their cooperative elevator facilities on the rivers, which will be depreciated by decreased volume of barge traffic. (c) The Chicago grain dealer must absorb, or pass on to his eastern customer, the cost of transporting the grain east from Chicago; such transportation cost will be higher by 3 cents a hundred pounds to all-Eastern Destinations when the grain is transported east by rail; aside from abnormalities arising from wartime conditions, which have occasionally created the sellers' market referred to by the Commission, under the Commission's prescribed penalty rate thereon ex-barge grain in the hands of a dealer on the Chicago market will be worth 3 cents less for

[23] 262 I. C. C. 7, 24.

reshipment by rail to Eastern Destinations than ex-rail or ex-lake grain.

(d) The Commission found, as to discount in prices paid for barge-arrived grain on the Chicago market resulting from the reshipping rates thereon prescribed by it, that there is "no reason" why such discount should be as great as the rate increases resulting from such prescribed rates. Assuming that finding of the Commission were supported by the record, viz, that such discount of ex-barge grain were 2½ cents, or 2 cents, it affords no rational basis for the imposition of said 3 cent rate penalty on all ex-barge grain from Chicago to Eastern Destinations. Insofar as said finding of the Commission refers to grain for reshipment under normal conditions by rail to destinations east of Chicago there is compelling reason (as is also disclosed by the findings in the reports of the Commission that price parity on ex-rail, ex-barge and ex-lake grain is due to reshipping rate parity[23a]) why such discount on ex-barge grain should at least closely approximate said prescribed increases in the reshipping rates thereon, and no substantial reason to doubt that result. Ex-barge grain will be discointed on the Chicago market, as a result of said penalty rates on ex-barge grain.

334 (e) Succinctly restated, the discount in the Chicago price on ex-barge grain resulting from the increased rail charge for moving it east, will decrease the net price to the farmer who brings his grain to the river, which shrinks the farm area adjacent to the river deriving any benefit from the low barge rates to Chicago, diminishes the advantage in the narrowed area still deriving any advantage from the low barge rates, and correspondingly shrinks the barge tonnage into Chicago.

(f) Some grain can and does find escape from Chicago to the east over the Great Lakes.[24] The lake escape for grain from Chicago is not available at all during about five months of every year, when lake navigation is closed by weather and ice conditions on the lakes, and especially the freezing of the Straits of Mackinac through which grain via lake from Chicago must pass. There are annually peak movements of grain to Chicago from origins served by barge at times of year when lake navigation is closed. A large part of the grain moving east from Chicago by rail is for transit intermediate to Buffalo, N. Y., at points that cannot get such service by lake.[25]

(g) When grain inbound by barge is not merchandized at Chicago, but is shipped via barge-rail routes through Chicago for the account of a processor to the east thereof (as for example, wheat

[23a] 262 I. C. C. 7, 17, 18, 21.
[24] See finding number 8.
[25] See finding number 12.

from Kansas City to the Montana Flour Mills at Cleveland, Ohio), there is an initial saving in the inbound rates by barge of 6.5 cents (16 less 9.5), which same difference would be reflected at ultimate Eastern Destination if ex-barge grain is continued on a reshipping rate level parity with ex-rail grain from Kansas City. Presently, that saving is harrowed by an additional expense of 3.25 cents at Chicago for trimming, weighing, elevation and inspection of the barge-arrived grain (262 I. C. C. 7, 23, 24) similar items not being encountered in connection with direct shipments of all-rail grain. Additionally, if the barge shipments from Kansas City came from an elevator thereat, other than the one elevator located on the river bank, additional switching charges and a transfer charge from car to barge must be paid. (262 I. C. C. 7, 23, 24.) These latter charges are the equivalent of 2.64 cents per hundred pounds on a 100,000 pound car. When a 3-cent penalty is imposed in connection with the ex-barge reshipping rate, the sum of that penalty plus 3.25 plus 2.64 equal 8.89 cents, which exceeds by 2.39 cents the inbound rate saving from the use of barge service, so as to make the use of barge-rail service commercially impossible under the ex-barge reshipping basis prescribed by the Commission.

335 (19) The volume of barge grain traffic to Chicago will be substantially curtailed by the said penalty rate basis prescribed on ex-barge grain. Hitherto, the Commission finds: "The proportionals from Chicago on the ex-barge grain being substantially [sic] the same as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billing and to utilize such grain in their hedging operations." (262 I. C. C. 7, 23.) "Backed by barge billing" refers to the fact that in order to secure the application of the outbound rail proportionals, inbound billing for a like amount and kind of grain must be surrendered to the Inspection Bureau at Chicago. The "proportionals" (reshipping charges) from Chicago on the ex-barge grain are not substantially the same, but exactly the same, as on ex-rail and ex-lake grain, to all Eastern Destinations. The Commission finds: "Under the proportionals approved herein on the ex-barge traffic it may be necessary to accord grain backed by barge billing some discount under the Chicago price, * * *" (262 I. C. C. 7, 29) (going on "but certainly there is no reason why such discount should be as great as the increases resulting from such proportionals," as to which see finding 18 (d) herein).

(20) The said proposal of the Eastern Railroads to increase the reshipping charges on ex-barge grain from Chicago east (relative to such charges on ex-rail grain was made with the avowed purpose of driving inbound barge grain traffic, on the barge-rail route via

Chicago, off the water and onto the rails;[25a] the Commission now correctly finds that it would have that effect.[25b] By said order the Commission prescribes an increase in the reshipping charges
336 on ex-barge grain from Chicago east (relative to such charges on ex-rail grain) which differs only in degree from the said proposal of the Eastern Railroads, and would divert barge-rail traffic from the lines of plaintiff barge lines to the competing lines of the Western Railroads that bring grain to Chicago from the same western origins.

(21) The inbound barge rates on grain to Chicago represent an adjustment predicated on the volume of such inbound barge traffic. Decrease of such inbound barge traffic volume would require an increase in the barge rates. The volume of such barge traffic varies inversely with the barge rates. A change of a quarter of a cent in the barge rates affects the volume of such barge traffic. Decrease of the volume of such barge traffic does not proportionately decrease the costs of the barge movement of such traffic by the barge lines.

(22) The Commission finds:

The present combinations on the barge-rail traffic, being so much lower than the all-rail rates from the same and other origins, have diverted and will continue to divert a substantial portion of the traffic to barge-rail routes via Chicago from the all-rail routes, including those through Indianapolis and other markets. This is due, in part, to the level of the barge rates. However, it is also partly due to the level of the present ex-barge proportionals.[26]

The fact that the barge-rail combinations from any origin via Chicago to Eastern Destinations are lower than the all-rail charges and combinations on such traffic, is solely due to the level of the inbound barge rates to Chicago; for the amount of outbound rail reshipping charges to all Eastern Destinations is precisely the same on the all-rail and barge-rail traffic. To the less-important Central Territory destinations, the fact that the barge-rail combinations via Chicago are lower than the all-rail rates, is also due to the level of the inbound barge rates; to all Central Territory destinations the amount of the outbound rail charges is precisely the same on all-rail and barge-rail traffic on grain originating in Trans-Mississippi and Northwest territory, and on the whole as high (and usually higher) on the barge-rail traffic on grain originating in Illinois. The statement that the condition above described by the Commission "is partly due to the level of the present ex-barge proportionals" is supported by the record in the sense that the advantage of lower inbound barge rates on

[25a] See finding 26 post, footnote 32.
[25b] 262 I. C. C. 7, 25.
[26] 262 I. C. C. 7, 29.

barge grain is not extinguished by higher outbound rail charges on that grain, under the equal reshipping charges on ex-barge, ex-rail, and ex-lake grain hitherto in effect. But it affords no rational support for the Commission's order.

(23) The inbound barge rates to Chicago are reasonable, and compensatory to the barge lines.[27] The difference between the barge-rail and all-rail combination rates via Chicago to Eastern Destinations, reflects and preserves the inherent low-cost advantage of water transportation on the barge-rail routes. This is equitable.

337 (24) The Commission does not find how the inherent low-cost advantage of barge transportation to Chicago would be preserved under its order prescribing said penalty charge on rail transportation of ex-barge grain out of Chicago. Assuming, as the Commission states, that "If the rates on the ex-barge traffic are adjusted 'in view of its particular circumstances and under the provisions of the Act designed with reference thereto,' the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traffic, thus preserving the inherent advantage of barge transportation to the adjacent farm community and all others concerned, without any adverse effect on the wartime stabilization program or the effective use of the waterway" (262 I. C. C., 29) that general hypothetical statement does not constitute a finding of fact that any particular rates (such as those prescribed by the Commission's said order) either will have the effects stated, or are in compliance with the requirements of the Interstate Commerce Act, as amended. Furthermore, so regarded, said statement would conflict with specific facts found by the Commission, a conflict not resolved by any finding of the Commission. (Moreover, if so regarded said statement would lack substantial support in the record.)

(25) The Commission found:

To trunk-line and New England territories, the ex-barge proportionals are the same as the uniform ex-rail proportionals or specifics. To central territory, the ex-barge rates from the Illinois origins are the same as the northwest proportionals, and from Kansas City the same as the trans-Mississippi proportionals. The barge-rail combinations are not made subject to the above-quoted fourth-section rule and from Illinois are generally far below the local rates from Chicago and also lower than the local rates from numerous intermediate origins in central territory, con-

[27] The Commission correctly so found. (262 I. C. C. 7, 19): "The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding, may be accepted as reasonable."

stituting numerous and extreme departures from the long- and-short haul provision of section 4 of the Interstate Commerce Act. For example, from Morris, they are lower than the local rates on domestic grain to trunk-line and New England territories from all central territory origins west of a line running south from Amadore, Mich., through Oxford, Mich., just west of Hudson, Mich., then east of the Ohio-Indiana State line south to a point just west of Cincinnati, Ohio. They are also lower than the local rates on export grain from all central territory origins west of a line from Erie, Pa., south through Meadville, thence via Johnsonburg, to Altoona, Pa. The barge-rail rates are far below the all-rail rates from the same and other Illinois origins. This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins, and it is difficult to see, with such extreme disparities, how such requests could properly be denied. As shown by appendix B, table I, there is a substantial production of corn in central territory. While the farmers therein did not appear at the hearing to show that they were hurt by this situation, such evidence was adduced by others in the same relative position, namely, the associations of private and farmer cooperative elevator companies at numerous rail origins in Illinois. This is what is meant by the statement in the prior report[25] that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure.

The bare arithmetical rate computations above stated by the Commission are assumed to be correct; it is also true that:

(a) As to grain produced at intermediate locations between Chicago and destinations to the east, the farm producers, marketers and shippers of such grain and products thereof (who are herein collectively called "intermediate shippers"), insofar as they may compete with grain or products thereof moving through Chicago in supplying demands to the east of them, are unaffected in that competition by the transportation or other costs of moving grain to Chicago. The commercial effect of differences in cost, including transportation cost, of getting grain to Chicago, is exhausted when the grain arrives at Chicago, where it takes the Chicago market price. The price with which any intermediate shippers are in such competition is the delivered price at eastern destination—viz, the Chicago market price plus the reshipping rate east from Chicago. Under the Commission's order, barge-rail grain would be subjected to a higher reshipping rate east from Chicago, and would be correspondingly discounted on the Chicago market to put its delivered price at the eastern destination on a competitive parity with all-rail and lake-rail grain (if, after the

[25] 262 I. C. C. 7, 20.

ex-barge rates prescribed by the Commission became effective, there were any barge-rail grain on the Chicago market at all). The Commission's order would not affect the Chicago market price, nor the reshipping rate east from Chicago, on all-rail and lake-rail grain. The competitive situation of any intermediate shipper as to grain moving via Chicago would not be affected by the Commission's order.

(b) Low-cost water transportation by barge to Chicago, enabling producers of grain west of Chicago to realize a higher price on their grain when it moves by barge to Chicago, gives marketers at Chicago an economic advantage in the accumulation of grain produced west of Chicago over marketers at locations [29] who deal in grain moving all-rail from origins west of Chicago to Eastern Destinations; which economic advantage is due to the fact that there is low-cost water transportation by barge to Chicago and is a natural economic advantage from geographic location, which cannot be conferred on marketers or dealers or elevator operators (wherever located) who are dependent on all-rail routes. This natural economic advantage can, however, be wholly or partly destroyed; as, by increasing the cost of out-bound rail transportation east from Chicago on grain that has enjoyed the low barge rates into Chicago, thereby decreasing the price advantage realized by the farm producer west of Chicago from the use of barge transportation to Chicago, and enabling marketers dependent on all-rail transportation to accumulate more grain produced west of Chicago for all-rail transportation, to the disadvantage of the producers and the barge lines.

339 (c) Grain marketers, dealers and elevator operators (interested in accumulating grain) who are dependent on all-rail routes are not in the same relative position as farmers (interested in selling grain) who are dependent on all-rail routes. The fact that some farmers are so located as to have accessible low cost barge transportation and receive, for that reason, a higher price for their grain, does not decrease the price received by farm producers not so located, and dependent on all-rail transportation. Grain marketers, dealers and elevator operators so situated as to have accessible low cost barge-rail transportation have an economic advantage in that they are able to pay a higher price per bushel, and thus accumulate more grain, than those marketers, dealers and elevator operators who are dependent on higher cost all-rail transportation. That advantage of grain marketers, dealers and elevator operators so situated as to have accessible low cost barge-rail transportation is a natural economic advantage, which cannot be equalized with, or conferred on, others not so situated;

[29] Including intermediate locations, such as Indianapolis.

but which can be destroyed, as, by increasing the outbound rail charges on grain that has enjoyed low inbound barge rates.

(d) The Commission's finding that the situation is inequitable as between all-rail shippers, including "intermediate shippers," on the one hand, and barge-rail shippers on the other hand, is unsupported by the record. It is equitable that the low-cost advantage of water transportation on this barge-rail route should be preserved, and reflected at every destination on the barge-rail route. It is not preserved by increasing the transportation charges on the outbound rail leg of the barge-rail route because the inbound barge rates are low.

(e) All that is said by the Commission in its finding quoted in the first paragraph of this Finding of Fact relates to rate equities as between shippers and does not relate to rate equities as between connecting lines. That finding provides no rational support for the Commission's order as directed to the issue under Section 3 (4) of the Interstate Commerce Act.

(f) The present equality of reshipping rates from Chicago on ex-barge, ex-rail, and ex-lake grain to Eastern Destinations has been part of the grain rate structure for more than a decade.

(g) About $60,000,000 of public funds have been expended by the State of Illinois and the Federal Government in the improvement of the Illinois Waterway, which is the water link connecting Chicago with the inland river system of the continent.[29]

340 (h) The above-quoted comparison made by the Commission of a combination of water rates and rail reshipping rates, with local rail rates, is a comparison of unlike entities.[30] At no point on the barge-rail route is there a lower barge-rail combination rate for a shorter than for a longer haul.

(i) The Commission's finding that said situation involves departures from Section 4 of the Interstate Commerce Act does not support its order, in view of the Commission's conclusion that neither the so-called fourth-section rule in the tariffs of the eastern railroads, nor the long-and-short haul clause of Section 4 of the Interstate Commerce Act does, or should, govern this

[29] *"History of the Illinois Waterways."*—During the period from 1848 to 1908, what was then called the Illinois & Michigan Canal was open to the transportation of grain and other commodities into Chicago. In 1908 the State of Illinois authorized a $25,500,000 bond issue for the improvement of the Illinois Waterways, including a portion of the Illinois River. In 1930 the Federal Government took over the project, and the Waterways were again opened for navigation into Chicago in 1933. Exclusive of the expenditures on the old Illinois & Michigan Canal, it is estimated that the total cost of improvements of the Illinois Waterways for navigation purposes has been $60,000,000. No lock charges are made on the Illinois Waterways. Upon the reopening of these waterways certain individuals, grain merchants, and elevator companies, "invested large sums in elevator facilities along its course." (246 I. C. C. 353, 354–55.)

[30] The local rail rate from Fort Wayne, Indiana, to New York is 30 cents. The transit balance of the reshipping rail rate from Fort Wayne to New York (the difference between the reshipping rates from Chicago to New York and to Fort Wayne) is 11½ cents. Fort Wayne has no water rates and no reshipping rates.

barge-rail adjustment, the Commission's finding in respect to this being quoted in the margin: [31]

(26) The proposal to charge a higher rate on ex-barge than on ex-rail or ex-lake grain did not originate with the Commission or with shippers. It was originated by the railroads, for the purpose of driving the inbound traffic to Chicago off the water and onto the rails.[32] It did not include a proposal to increase the ex-lake rates because it was felt that the application to ex-lake grain of the existing reshipping or proportional rates at Chicago did not take any business away from the Western Railroads.[33]

341. The witness for the Eastern Railroads made no claim at any time that any greater service was rendered or any greater cost incurred in the handling of ex-barge grain at or beyond Chicago than in the handling of ex-rail and ex-lake grain at or beyond Chicago so as to explain, excuse, or justify a higher reshipping rate level on ex-barge than on ex-rail and ex-lake grain

(27) Findings on which the Commission purported to base its conclusion that higher rates on ex-barge grain than on ex-rail and ex-lake grain would not be discriminatory as between connecting carriers read as follows (262 I. C. C. 7, 27–28):

"Where, as here, ex-rail and ex-lake proportionals or specifics reflect average circumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.

"The principal differences as shown by this record and described above may be summarized as follows:

1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit serv-

[31] "Under section 6 (b) [3] of the Transportation Act of 1940, respondents are not required to increase their present ex-barge proportionals to bring the barge-rail combinations in harmony with fourth-section principles. But this section cannot be construed as precluding respondents from increasing those proportionals to bring the barge-rail combinations more nearly into conformity with section 4. Since section 6 (b) of the Transportation Act of 1940 protects the departures in the present adjustment it follows that it will protect any departures of lesser extent, such as those resulting from the rates approved herein" (262 I. C. C. 7, 30–31).

[3] This section appears on page 24 of our compilation of the Interstate Commerce Act and related sections of other acts, revised to April 1, 1941, and at 54 Stat. L. 904. The provision of that section referred to reads as follows:

"In the case of a carrier heretofore subject to the provisions of paragraph (4) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section."

[32] The Eastern Railroads offered only one witness at the hearings who testified at page 90 of the transcript of the testimony taken by the Commission: "We made this proposal, as I have stated several times, and filed these tariffs with the hope that we could drive the business off the water and back on the rails where it belongs" (248 I. C. C. 307, 321).

[33] Testimony of witness Tannehill for the Eastern Railroads at page 3660 of the transcript of the testimony taken by the Commission.

ice at intermediate points in official territory and less line-haul service to the southern portion of central territory.

2. The in-bound rail hauls of all the traffic which engages the ex-rail proportionals are substantially longer, on the average, than the in-bound barge hauls.

3. The rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic here considered, include:

(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of the gateways an average out-bound factor which is a component part of many through rates of different amounts, which vary with the length of the in-bound hauls and the western factors applicable thereto.

(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the in-bound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways.

(c) The ex-rail proportionals or specifics, combined with the in-bound interstate rates or specifics, result in through all-rail rates to official territory which harmonize with each other and with the local rates in that territory.

4. Lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul in-bound and is usually preceded by an in-bound rail haul. The rail-lake-rail combinations, in general, conform to the principles which underlie section 4. In these respects, lake grain is like barge grain from Kansas City but unlike barge grain from Illinois. To trunk-line and New England territories the lake-rail grain differs from all of the barge-rail grain moving through Chicago in that the lake-rail grain can and generally does bypass that gateway entirely." 342

We find:

The findings of the Commission do not disclose any rational relation between such differences, if any, and the difference in reshipping rate prescribed on ex-barge grain as compared with the established reshipping charges, that remain applicable on ex-rail and ex-lake grain and that have hitherto been applicable on ex-barge grain. Nor does the record before the Commission disclose any such relation.

(28) As to the Commission's said finding that "on the average" there were differences as found by the Commission in paragraph

"1" above quoted, between ex-barge and ex-rail grain,[34] we find that:

(a) Such differences also exist between ex-rail and ex-
343 lake grain.[35] Under the Commission's order the same re-
shipping rate east from Chicago would prevail on ex-rail and ex-lake grain and a higher reshipping rate on ex-barge grain only. Ex-barge and ex-lake grain via Chicago are in competition to supply eastern demands.

(b) The application by the Eastern Railroads of the present reshipping charges on ex-rail (or ex-lake) grain is not, and, under the Commission's order would not be, contingent upon the amount of terminal or transit service such ex-rail (or ex-lake) grain does or does not receive. Under the tariffs and the order, that portion of the ex-rail (and ex-lake) grain traffic which receives the identical transit and terminal services at Chicago and at transit points east thereof as is received by ex-barge grain will move on the present and lower reshipping rate level.

(c) Assuming the record showed any substantial difference, or any difference whatever, in the costs and services of the Eastern Railroads in handling (a) grain products or grain moving in continuous service through Chicago, on the one hand, and (b) whole grain receiving a transit service and transfer of lading at Chicago, on the other hand, the "averaging" of all ex-rail grain falling in both categories for the purposes of the report and order is the equivalent of according grain falling in the first category a higher reshipping rate level, costs and services considered, and ex-rail grain in the second category a lower reshipping rate level, costs and services considered, than is to be continued with the

[34] The Commission elsewhere finds: "The western factors of the through rail rates include not to exceed three transit services without additional charge, and to the extent that the all-rail shipments receive transit on the in-bound movements to the gateways there is less demand on the eastern carriers to perform transit service thereon. This record shows that there is a very substantial volume of domestic grain and grain products moving from points west of the gateways to the East without transit at the gateways or points east thereof. That such through movements by rail are substantial is shown by the statistics set forth in appendix B hereto coupled with the fact that official territory consumes as grain or products about 156,000,000 more bushels annually than it produces. Moreover, all-rail grain may be, and frequently is, marketed and processed at Chicago under one transit operation, which avoids the necessity for processing at an intermediate point east thereof. Transit is not available under the in-bound barge rates. Barge-rail grain is marketed but not processed at Chicago. To be processed before final destination it must be transited at some point beyond Chicago. It follows that respondents are called upon to perform more transit service, on the average, on the ex-barge than on the ex-rail traffic" (262 I. C. C. 7, 22).

Grain processed in transit at Chicago, or west of Chicago, comes to the hands of the eastern railroads as grain products and takes a different rate than the reshipping rate on whole grain. "From the gateways to trunk-line and New England territories grain products take 0.5 cent over grain. * * *" (262 I. C. C. 7, 14).

The eastern railroads bear no costs of elevation.

[35] The Commission finds: "Unlike the all-rail traffic, the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading, and requires a full origin and terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation" (262 I. C. C. 7, 18-19).

approval of the Commission on all ex-rail grain: and is the equivalent of according ex-rail grain in the second category a lower reshipping rate level than would be required thereon by the rate-making principle followed by the Commission in prescribing a reshipping rate level on ex-barge grain.[36] The ex-rail grain in the second category (grain receiving a transit service in connection with temporary storage at Chicago) far exceeds in volume the total volume of ex-barge grain. The so-called "averaging" of all ex-rail grain falling in both categories bears no rational relation to the uniform 3-cent penalty prescribed in the reshipping rate level on ex-barge grain from Chicago to Eastern destinations.

(d) Ex-rail and ex-barge grain moving through Chicago receives exactly the same line-haul service to the southern part of Central Territory. If it were otherwise, such difference of rail service from Chicago to the southern part of Central Terri-
344 tory would have no rational relation to the 3-cent reshipping rate penalty prescribed on ex-barge grain from Chicago to Eastern destinations.

(e) Under the tariffs and the order, the portion of the all-rail grain traffic which moves via Chicago and over the same circuitous routes to the southern portion of Central Territory as ex-barge grain will move on the present reshipping rate level lower than is prescribed for ex-barge grain.

(f) There is no finding which specifies the extent of the differences found to exist in general terms in paragraphs 1 and 2 above quoted and there is no evidence tending to show the extent of such differences, if any.

(g) The Eastern Railroads obtain the same charges and revenues on ex-rail, ex-lake and ex-barge grain.

(h) There is no finding (and no evidence) that the Eastern Railroads sustain any substantial differences of cost in their service east from Chicago on ex-rail, ex-lake, and ex-barge grain moving to the same destinations.[37]

In its report of December 1, 1941, the Commission found (248 I. C. C. 307, 311) "* * * in each instance [ex-barge, ex-rail, and ex-lake reshipments] the physical carriage beyond the reshipping point is substantially the same." In its report of February 13, 1945, the Commission found (262 I. C. C. 7, 8 emphasis supplied) "Ex-barge, ex-lake and also ex-rail traffic except as herein-

[36] The tremendous volume of grain shipped out-bound from Chicago to the east, only a small portion of which can be ex-barge grain since barge-arrived grain constitutes a small fraction of all in-bound grain received at Chicago, is shown in Finding No. 8.

[37] The subject is mentioned, however, in the dissenting opinion of Commissioners Alldredge and Lee: "The eastern railroads have not shown a need for additional revenue or established the existence of any higher costs of consequence, terminal or otherwise, in the transportation of ex-river traffic than those incurred in the handling of ex-rail or ex-lake traffic of the same character" (262 I. C. C. 7, 35).

after indicated, are all accorded the same outbound service, * * *.". The matters "hereinafter indicated" are described in the finding of the Commission first quoted in Finding of Fact number 27 and do not constitute substantial differences in outbound service in respect to ex-barge grain, on the one hand, as compared with ex-lake grain, on the other, or as compared with ex-rail grain from the same origin which receives, as is provided by the tariffs, at and east of Chicago the same transit and terminal services and the same line-haul service as is received by ex-barge grain.

(i) Assuming that substantial quantities of ex-rail grain are processed in transit west of and at Chicago and move east of Chicago as grain products without receiving additional transit services, whereas, all ex-barge grain is processed in transit at points east of Chicago, so that the latter grain receives on the average more transit services east of Chicago when moving on the rates in issue than does the average of all all-rail grain and grain products, it further appears that any transit service received for processing purposes east of Chicago pays a 0.5-cent charge
345 therefor in addition to the reshipping rate.[37a] By reason of this fact, the difference in the average transit service east of Chicago on ex-barge as compared with ex-rail grain is not a difference in circumstances related to the reshipping rates for line-haul service in issue in this cause.

(j) Furthermore, if it were otherwise, and if it be a fact that a substantial volume of grain or grain products moves via all-rail routes from points west of "the gateways" to the East without transit at "the gateways" or points east thereof, the evidence referred to by the Commission in its finding quoted in footnote No. 34 above does not show how much (if any) thereof moves via Chicago, or any rational relation with the penalty imposed on the reshipping rate on ex-barge grain from Chicago to the East.

(29) With respect to the finding of the Commission in said paragraph "2" above quoted that the inbound rail hauls of all of the traffic which engages the ex-rail proportionals are substantially longer "on the average," than the inbound barge hauls, we further find:

(a) Under the Commission's order ex-barge grain and ex-rail grain of like kind coming from an identical origin west of Chicago will always take different reshipping rates from Chicago depending on whether the inbound haul was by barge or rail, the higher rail reshipping charge being assessed on ex-barge grain

[37a] Witness Scott, in describing the total transportation charges on grain from Kansas City to New York City moving via barge to Chicago, thence via rail to Cleveland or Fostoria, Ohio, for processing under transit, and thence as grain products to New York City, stated that such aggregate included 0.5 cents for transfer (transit) at the Ohio processing point (pp. 3549-3550 of transcript of hearings before the Commission).

from such identical-origin to all Eastern Territory (and most Central territory) destinations.[38]

(b) The barge lines and the Western Railroads are in competition for the inbound haul only from origins accessible to inland river transportation. The inbound "rail" hauls of "all of the traffic" engaging the reshipping rates include inbound rail hauls from origins not accessible to barge transportation, whose length, when included in such average, renders it irrelevant to and without rational bearing upon said competitive traffic between the barge lines and the Western Railroads, and without rational bearing upon the non-discriminatory relation that should prevail under the Interstate Commerce Act, as amended by the Transportation Act of 1940, with respect to the rail reshipping rates and charges east from Chicago on the traffic of the barge lines and the Western Railroads from identical, water-competitive origins.

(c) The reshipping charges, referred to in said finding of the Commission as "the ex-rail proportionals" are, and for many years have been, also the ex-barge reshipping rates or proportionals.

(d) "To Trunk-line and New England territories the proportionals from Chicago and the other gateways are uniform, regardless of origin"[39] (262 I. C. C. 7, 12) and would so
346 continue as to ex-rail and ex-lake grain under the Commission's order.

(30) The alleged difference in rate-making circumstances found in paragraph "3 (a)" above quoted is not truly such, since the ex-barge rates likewise are a component of the many through rates of different amounts, which through rates vary with the lengths of the inbound hauls and the western factors applicable thereto, whether said ex-barge rates are made the same or higher than the ex-rail and ex-lake rates.

(31) As to the difference found by the Commission to exist between all-rail and barge-rail transportation in paragraph numbered "3 (b) (2)" above quoted,[40] that the "ex-rail" reshipping charges from Chicago to all destinations to the east thereof "are" adjusted to equalize the "all-rail" rates by the various routes and gateways,[41] the Commission's further finding is:

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[38] Here, and before the Commission, the plaintiffs complain of this (among other things) as discrimination between connecting lines.

[39] Reshipping charges on grain east out of Chicago to eastern destinations have been uniform irrespective of origin since February 1, 1910 (262 I. C. C. 7, 12, 14).

[40] As to paragraph "3 (b) (1)" above quoted, see findings numbered 25 (e), (g) and (h) hereinabove made.

[41] Combination through rate factors on grain from trans-Mississippi and northwest territories to and from St. Louis and Peoria produce the same total through rates as to and from Chicago. This result is produced by an adjustment of inbound and outbound rates by rail which vary inversely. Such result is termed "gateway equalization." However, from the Illinois origins from whence moves the preponderance of the barge grain, the only gateway used in constructing combination through rates to the east is Chicago, and no other gateway market is "equalized" therewith under the all-rail adjustment.

"Peoria and St. Louis would, of course, be entitled, on reasonable request, to ex-barge proportionals properly aligned with those approved herein from Chicago, but the record does not contain sufficient detail for the prescription of such proportionals in this proceeding" (262 I. C. C. 7, 32).

347 There is no finding (nor evidence) that ex-barge proportionals cannot be prescribed, or voluntarily established by the carriers, via other routes and gateways, equalizing the barge-rail rates via such other routes and gateways, in alignment with the present reshipping charges on ex-barge grain from Chicago. That the process of equalization of the various routes and gateways had reached maturity as to all-rail rates, and remains to be completed as to barge-rail rates, constitutes no intrinsic difference between all-rail and barge-rail transportation as such, it is not rationally related to the Commission's conclusion that the process of alignment of the ex-barge rates via other routes and gateways should go forward, as the Commission proposes, on the basis of a penalty rate from Chicago on ex-barge grain as against ex-rail grain, thus extending the penalty basis prescribed to barge traffic via other routes and gateways.

(32) As to the alleged difference found by the Commission to exist between barge-rail and all-rail grain traffic in paragraph "3 (c)", above quoted, there is no finding by the Commission (and no evidence in the record) to show that combination through barge-rail rates based on ex-barge reshipping or proportional rates made the same as the ex-lake and ex-rail reshipping or proportional rates, would fail to harmonize with each other and with the local rates in that territory. Such rates would "harmonize" in every sense that the combinations resulting from the rates prescribed by the Commission harmonize. However, barge-rail rates based on inbound water rate factors sufficiently low to reflect the inherent advantages of low cost water competition are necessarily in "disharmony" with all-rail rates based on inbound rate factors reflecting the higher costs of rail service. Such disharmony must exist unless barge-rail combination through rates are made as high as the all-rail combination through rates. They can be

348 made as high in two ways: By increasing the inbound barge factor to equal the inbound rail factor or by increasing the outbound rail factor on the ex-barge traffic by an amount sufficient to offset the difference between the respective inbound rates by barge and by rail. The practical commercial effect of the Commission's order is the same is if it had required a 3-cent increase in the inbound rates by barge in the face of its finding that said barge rates are reasonable and compensatory.

(33) As to the finding of the Commission in paragraph "4" above quoted, we refer to findings hereinabove made, and further find:

(a) The said finding of the Commission does not recite any difference in transportation circumstances and conditions as between ex-lake grain, on the one hand, and ex-barge grain from Kansas City, but, on the contrary finds that such conditions are similar.

(b) Substantial quantities of wheat come to Chicago ex-barge, from Illinois origins. It is also true that over a period of almost four years more wheat came to Chicago by barge from all origins than by lake. (262 I. C. C. 7, 41).[42]

(34) The reshipping rate level to be continued on ex-rail and ex-lake grain is not contingent on the length of the in-bound haul to Chicago; is not contingent on whether the grain moves in continuous service via Chicago or some other gateway or is temporarily stored in Chicago prior to reshipment; is not contingent on the amount of the terminal or interchange service performed by Eastern Railroads in Chicago or other junction points on the shipment or reshipment of the grain; is not contingent on the amount of transit service received by the grain at intermediate points in connection with either the in-bound hauls to Chicago or the out-bound hauls therefrom; and is not contingent on the amount or circuity of the line-haul service on the routes to, via, or from Chicago to ultimate destination. Stated differently, said reshipping rate level is held out by the tariffs of Eastern Railroads and applied to all ex-rail and ex-lake grain reshipped at Chicago; this includes grain which moves in-bound for both short
349 and long distances; and includes grain which moves through Chicago or other gateway or junction points in continuous service and grain which is temporarily stored at Chicago and there transferred from car, boat, or barge to an elevator and then from elevator to car; and includes grain which received substantial transit services at intermediate points east of Chicago, as well as grain which receives no such transit service; and includes grain which moves over direct routes, as well as grain which moves over circuitous routes.

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[42] *Wheat Received at Chicago* (in thousands of bushels):

Year	By lake	By barge
1940		
1941	2,630	773
1942	1,404	1,695
1943 (first 10 months)	863	550
		34
Totals	4,903	5,049

(35) Other findings in the report and order of the Commission disclose that the relative amount of terminal and transit service at the gateways or junctions, the relative amount of transit service at intermediate points in Official territory, the relative amount of line-haul service performed by the Eastern Railroads and the relative lengths of the in-bound hauls do not constitute rate-making considerations observed in the establishment and maintenance of the ex-rail and ex-lake rates. Such findings read as follows:

"The service under the in-bound rail rates to the gateways includes switching to the train at origin, the privilege of intermediate transit stops, not exceeding three, and terminal service at the gateway. The through rates apply whether the traffic moves in continuous through transportation in which case interchange is the only service performed at the junction, or under the governing transit provisions where it is stopped at the gateway or other intermediate point for marketing or processing. In the latter event, the out-bound service generally consists of concentrated movements in large lots of several cars at a time out of terminal elevators." (206 I. C. C. 7, 14.)

"The all-rail adjustment by providing for proportionals or out-bound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assist them in maintaining a common price, thus facilitating hedging and other market operations. The all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and circuitous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points." (206 I. C. C. 7, 17.)

"Unlike the all-rail traffic, the lake-rail traffic following the water course moves only over circuitous routes, requires transfer of lading, and requires a full origin terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation. The in-bound lake movement consists chiefly of wheat moving for relatively long distances." (206 I. C. C. 7, 17–18.)

350 36. The Commission found: "As to the ex-lake rates from Chicago, that these do not adversely affect those interested in the barge-rail traffic via Chicago is shown by the fact that if such ex-lake rates were increased, lake grain from the Northwest would continue to flow to the Lake Erie and Hudson River ports, and those interested in the barge-rail traffic via Chicago would be no better off than before." (262 I. C. C. 7, 29) Granting that ex-rail grain, if subjected to the same penalty basis

of rail reshipping rates east of Chicago as prescribed by the Commission on ex-barge grain, would be diverted via lake from Chicago to Lake Erie and Hudson River ports insofar as the same is for the supply of eastern dealers and processors located at eastern destinations (ea Buffalo), the Commission also finds that there is a movement of ex-lake grain from Chicago to dealers and processors in Central Territory (west of Buffalo) for transit there into Eastern Territory under the present parity of reshipping rates;[48] and large areas of Central Territory geographically cannot be served in such transit via lake through Lake Erie and Hudson River ports, but can be and are served with ex-lake grain through Chicago. The only route by which ex-lake grain can be shipped to dealers and processors in Central Territory as aforesaid in competition with ex-barge grain is via Chicago.

(37) The portion of the said order of February 13, 1945, herein complained of which prescribes higher rail reshipping charges on ex-barge than on ex-rail and ex-lake grain east from Chicago, is not supported by the findings of the Commission. The Commission considers matters to warrant said portion of said order that do not warrant it, and that have no rational relation to the conclusion that such ex-barge reshipping rates could lawfully be those higher than such ex-rail and ex-lake reshipping rates, prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940. The Commission seeks to support said portion of said order by findings that are unsupported by the record.

351 Upon the above and foregoing Findings of Fact, the court states the following:

Conclusions of Law

I.

The portion of the order of February 13, 1945, of the Interstate Commerce Commission which prescribes higher rail reshipping charges east from Chicago on ex-barge grain than on ex-rail and ex-lake grain, is of a character which this court has jurisdiction to enjoin and set aside, and this Court has jurisdiction over the subject matter of said suits.

II.

Plaintiffs in the above-entitled causes have an interest and standing which entitles them to bring and maintain these suits.

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[48] 262 I. C. C. 7, 18. See also footnote 8, supra, and testimony of Witness Tannehill for the eastern railroads at page 92 of the record before the Commission. Between 1933 and November 1, 1943, there were received at Chicago by lake 45,590,000 bushels of grains; by barge, 102,633,000 bushels; by rail 1,485,655,000 bushels (246 I. C. C. on 383; 272 I. C. C. 1, on 41). (These figures are confined to corn, wheat, oats and soybeans; other kinds of grain moving in less volume are not included.)

III.

The portion of the said order of February 13, 1945, herein complained of which prescribes higher rail reshipping charges on ex-barge than on ex-rail and ex-lake grain east from Chicago, is not supported by the findings of the Commission.

IV.

Findings made by the Commission in support thereof are not supported by the record in respects stated in the foregoing Findings of Fact.

V.

The Commission considers matters to warrant said portion of said order that do not warrant it, and that have no rational relation to the conclusion that such ex-barge rail reshipping charges could lawfully be higher than such ex-rail and ex-lake rail reshipping charges as prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940.

VI.

The Interstate Commerce Commission is without authority directly or indirectly to adjust any rates for the purpose of equalizing the economic advantage of those who are so located as to enjoy low-cost water transportation with the situation of others who by reason of their different location do not enjoy that economic advantage, notwithstanding the Interstate Commerce Commission's own opinion may be that the existence and enjoyment of such natural economic advantage is an inequitable situation.

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VII

Transportation circumstances and conditions involved in and pertaining to transportation by rail from points not accessible to and served by inbound water transportation to points east of Chicago were not material or relevant to the decision of the questions before the Commission; those circumstances and conditions have no rational bearing on the questions for decision which were in issue before the Commission; and the Commission erred in considering such circumstances and conditions in the averages referred to by it in its finding quoted in Finding of Fact No. 27, above.

VIII

In adjusting rail rates or charges on traffic moving via the connecting lines of common carriers who are regulated under the Interstate Commerce Act, whether such connecting carriers are water or rail carriers, and as between the traffic of such connecting

water carriers on the one hand and the traffic of such connecting rail carriers on the other hand, the Interstate Commerce Commission is bound to observe the requirements of Section 3 (4) of Part I of the Interstate Commerce Act as amended by the Transportation Act of 1940, and failed so to do.

IX

The Commission is without authority to remove any inequity found by it to exist by authorizing a rate discrimination between connecting lines.

X

Departures from, or violations of, the long-and-short haul provision of Section 4 of the Interstate Commerce Act, or the principles of that Section, cannot lawfully be cured by means which would violate Section 2 or Section 3 (4) of said Act.

XI

The Interstate Commerce Commission, in adjusting rail rates or charges on traffic moving via the connecting lines of common carriers who are regulated under the Interstate Commerce Act, under the requirements of Section 4 (1) of the Interstate Commerce Act, as amended by the Transportation Act of 1940 (and particularly Section 6 (a) (1) and 6 (b) thereof) is not at liberty to deny or qualify the requirements of Section 3 (4) of the Interstate Commerce Act, as amended by the Transportation Act of 1940.

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XII

The National Transportation Policy enacted by the Transportation Act of 1940 is not precatory, but is mandatory.

XIII

A principal inherent advantage of water transportation is that it is carried on at low cost, and it is the intent of the Interstate Commerce Act as amended in 1940 to include the same among the inherent advantages of all modes of transportation subject to the provisions of the Interstate Commerce Act, and that the Interstate Commerce Commission shall administer all sections of said Act, so as to develop, co-ordinate and preserve a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, which system incorporates and preserves said inherent low-cost advantage of water transportation.[44]

[44] 81 Cong. Rec. p. 6127.

XIV

The portion of said order of February 13, 1945, which authorizes prescribed higher rail reshipping rates or charges east from Chicago on ex-barge grain than on ex-rail grain is invalid, and should be enjoined as prayed in the complaints.

EVAN A. EVANS.
M. L. IGOE.
WALTER J. LA BUY.

353 In the District Court of the United States for the Northern District of Illinois Eastern Division

Consolidated Case No. 45–C–865

Civil Action File No. 45–C–865

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

Civil Action File No. 45–C–866

INLAND WATERWAYS CORPORATION, PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil Action File No. 45–C–1020

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES AND THE WAR FOOD ADMINISTRATOR, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT

Final decree

November 26, 1945

These consolidated causes coming on further to be heard upon the motion of the plaintiffs for a decree, and it appearing that:

(a) The court has entered herein certain Findings of Fact and Conclusions of Law;

(b) The Interstate Commerce Commission in the proceeding before it there known as "Investigation and Suspension Docket 4718, Grain Proportionals, Ex-Barge to Official Territory" referred to in said Findings of Fact entered on February 13, 1945, a certain order, a part of which should be enjoined as stated in said Conclusions of Law.

(c) Thereafter on October 4, 1945, this court entered herein its temporary injunction temporarily restraining such portion of said certain order entered on February 13, 1945, whereupon on the same day the Interstate Commerce Commission entered its further order in the same proceeding before it suspending until May 5, 1946 (unless otherwise ordered by the Commission), the operation of certain tariffs filed in conformity with said portion of said order of February 13, 1945, and especially Supplement 133 to Agent B. T. Jones' I. C. C. No. 3356 and Supplement 27 to Agent B. T. Jones' I. C. C. No. 3363.

Now, therefore, it is ordered, adjudged, and decreed by the court that:

1 Said order of the Interstate Commerce Commission of February 13, 1945, referred to in the pleadings herein, and entered by the Commission in the proceeding before it known as "Investigation and Suspension Docket 4718, Grain Proportionals, Ex-Barge to Official Territory," and the operation and effect of said last mentioned order of the Commission insofar as the same either

(a) Prescribes, approves, authorizes, or countenances in any manner whatever a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate or charge that is contemporaneously exacted in any form or under any guise for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from
356 railroad services in transporting east from Chicago like ex-rail grain from like origins west of Chicago; or

(b) Prescribes, approves, authorizes or countenances in any manner whatever a rate or charge for transporting ex-barge grain east from Chicago that, on account of alleged differences in conditions and circumstances surrounding the transportation of ex-barge and ex-rail grain, is higher on the ex-barge grain than any rate or charge contemporaneously exacted in any form or under any guise for the rail transportation east from Chicago of like ex-rail grain, or like ex-lake grain, so long as such relative differences also exist between transportation of like ex-rail and ex-lake grain without being reflected in the rail rates or charges for transportation east from Chicago of like ex-rail and ex-lake grain, be and it is hereby, forever enjoined.

2. And the Interstate Commerce Commission is hereby restrained and enjoined from taking any action or step whose effect, direct or indirect, would be to sanction, establish or permit to become effective any rail rates or charges for the transportation of ex-barge grain from Chicago to points lying to the east thereof that are higher than rail rates or charges that are or may be contemporaneously exacted for that service on like ex-rail or ex-lake grain, that are in any way predicated upon the purported authority of the said void portion of the order of the Interstate Commerce Commission of February 13, 1945.

3. This cause is hereby remanded to the Interstate Commerce Commission for further proceedings disposing of said proceedings known as "Investigation and Suspension Docket 4718, Grain Proportionals, Ex-Barge to Official Territory," in conformity with the Findings and Conclusions of this court.

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EVAN A. EVANS,
Circuit Judge.
M. L. IGOE,
District Judge.
WALTER J. LABUY,
District Judge.

359 In the District Court of the United States

Civil Action 45-C-865

Civil Action 45-C-866

Civil Action 45-C-1020

[Titles omitted.]

Petition for appeal

Filed Jan. 24, 1946

The Interstate Commerce Commission, one of the defendants in the above consolidated causes, feeling itself aggrieved by the final decree of the United States District Court for the Northern District of Illinois, Eastern Division, entered in said court on

360 November 26, 1945, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendant considers the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said defendant prays that a transcript of the record, proceedings and papers on which said decree was made and entered, duly

authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated January 24, 1946.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorneys for Interstate Commerce Commission.

362 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Assignment of errors

Filed Jan. 24, 1946

Comes now the Interstate Commerce Commission, one of the defendants in the above consolidated causes, and files the following assignment of errors upon which it shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said causes from the decree of the District Court of the United States for the Northern District of Illinois,
363 Eastern Division, entered on the twenty-sixth (26th) day of November, 1945.

The District Court erred:

1. In entertaining jurisdiction of these causes.

2. In concluding that the portion of the order of February 13, 1945, of the Commission which authorized higher rail reshipping charges east from Chicago on ex-barge grain than on ex-rail and ex-lake grain is of a character which it had jurisdiction to enjoin and set aside.

3. In making independent findings of subordinate facts based upon the record before the Commission.

4. In weighing the evidence and reaching conclusions upon administrative matters contrary to those found by the Commission.

5. In substituting its judgment for that of the Commission on administrative matters which have been placed within the exclusive jurisdiction of the Commission.

6. In entering its findings of fact numbered 4 to 37, inclusive, in that they involve findings of subordinate facts and subordinate conclusions of fact which are beyond the court's competence in a judicial review of the Commission's order in this case, and determinations of administrative matters wholly within the Commission's exclusive authority.

7. In failing to give effect to the Commission's finding that the rates of plaintiff, Mechling Barge Line are not subject to the Commission's jurisdiction where not more than three kinds of grain are transported in a given tow.

8. In failing to give effect to the Commission's finding that the ex-rail proportionals from Chicago are subject to a fourth-section rule, the effect of which, as to Trunk Line and New England territories, is to limit application of such proportionals to traffic on which an in-bound rate of not less than 8.5 cents has been paid.

364 9. In failing to give effect to the Commission's finding that under the all-rail adjustment the through rates and eastern factors thereof on grain from the barge origins are substantially lower than they would be under an adjustment from all-rail origins west of Chicago of the same average level but made on a distance scale where the out-bound balances or proportionals would vary inversely with the length of the in-bound and through hauls.

10. In failing to give effect to the Commission's finding that in-bound rail rates on grain from Illinois origins to Chicago, generally less than 8.5 cents, made to meet truck and water competition and known as lake locals, do not engage the ex-rail proportionals from Chicago.

11. In failing to give effect to the Commission's finding that the present proportionals can be and are maintained on ex-rail grain and at the same time farmers and all others concerned are accorded through rates from origins west of Chicago which harmonize with the local rates in the destination territory and are generally in strict conformity with the fourth section.

12. In failing to give effect to the Commission's finding that country elevators are located on the rails throughout the origin territory with only a short truck haul thereto from the farms.

13. In failing to give effect to the Commission's finding that on the all-rail traffic there is only one intermediary between the farmer and the dealer at the primary market.

14. In failing to give effect to the Commission's finding that the all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and circuitous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points.

365 15. In holding the Commission's findings that the rail-lake-rail combinations are in harmony with fourth-section principles, that Chicago is primarily an out-bound lake port on grain, and that rail-lake grain can and generally does bypass it entirely, to be without pertinency.

16. In holding the Commission's finding that the ex-barge proportionals are not subject to the forth-section rule so that the barge-rail combinations from Illinois are in most instances far below the all-rail rates from Illinois origins and also far below the local rail rates from intermediate origins in Indiana, Ohio, and western Pennsylvania, constituting numerous and extreme fourth-section departures, to be without pertinency.

17. In failing to give effect to the Commission's findings that the Illinois farmers were hurt by the application of the existing barge proportionals and that the plaintiffs were inconsistent in asking that the ex-barge grain be accorded these rates but not be subject to the same rules as the ex-rail grain.

18. In failing to give effect to the Commission's finding that the service under the ex-rail proportionals in connection with direct all-rail routes is less than under the ex-barge proportionals from Chicago.

19. In holding the Commission's finding that there is more transit service under ex-barge than under ex-rail proportionals, to be without pertinency.

20. In failing to give effect to the Commission's findings that in-barge transportation two intermediaries are required between the farmer and the dealer at the primary market and that barge grain cannot be transported from or to rail facilities away from the river at Kansas City and Chicago, respectively, without transfer of lading and extra switching.

366 21. In failing to give effect to the Commission's finding that the farmer depending on the Kansas City market receives no benefit from barge transportation.

22. In failing to give effect to the Commission's finding that the fourth-section rule and relative service limitation, usually imposed in barge-rail cases, if imposed in the instant case would result in considerably higher ex-barge proportionals than those approved.

23. In holding that the Commission's findings with respect to the average circumstances and conditions as between all-rail and lake-rail, on the one hand, and barge-rail, on the other, do not disclose a rational relation between such differences and the difference in the reshipping rate authorized as compared with the existing reshipping charges hitherto applicable alike on ex-rail, ex-lake and ex-barge grain.

24. In failing to give effect to the Commission's finding as to the essential nature and function of the ex-rail proportionals or specifics here considered.

25. In finding that the barge carriers will not have a fair opportunity to compete with the rail and lake carriers under the ex-barge proportionals approved by the Commission.

26. In failing to give effect to the Commission's finding that ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same out-bound proportionals if, as the act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower in-bound cost but, in addition, would extend to the barge-rail transportation most of the advantages of all-rail transportation.

27. In characterizing the ex-barge proportionals approved by the Commission as penalty rates.

28. In concluding that the portion of the said order of
367 February 13, 1945, which approved higher rail reshipping charges on ex-barge grain than on ex-rail and ex-lake grain east from Chicago, is not supported by the findings of the Commission.

29. In concluding that the findings made by the Commission are not supported by the record in respects stated in the Findings of Fact.

30. In concluding that matters considered by the Commission in approving the scale of ex-barge proportionals set out in its report have no rational relation to the conclusion that such ex-barge rail reshipping charges could lawfully be higher than ex-rail and ex-lake reshipping charges under the rules and standards of the Interstate Commerce Act.

31. In concluding that transportation circumstances and conditions involved in and pertaining to transportation by rail from points not accessible to and served by inbound water transportation to points east of Chicago were not material or relevant to the decision of the questions before the Commission; that those circumstances and conditions have no rational bearing on the questions for decision which were in issue before the Commission; and that the Commission erred in considering such circumstances and conditions in the averages referred to by it in its finding quoted in Finding of Fact No. 27.

32. In concluding that the Commission with respect to that portion of the order complained of failed to observe the requirements of section 3 (4) of the Interstate Commerce Act.

33. In concluding that the portion of the order of the Commission of February 13, 1945, which authorizes higher rail reshipping rates or charges east from Chicago on ex-barge grain than on ex-rail grain is invalid and should be enjoined.

34. In entering its final decree of November 27, 1945.

35. In entering its decree of October 4, 1945, temporarily,
368 restraining the operation and effect of said order of February 13, 1945, and requiring the Commission to suspend the tariff schedules filed in conformity to the authority conferred by said report and order of February 13, 1945.

36. In failing to find that said order of February 13, 1945, was:

a. Within the jurisdiction of the Commission.

b. Supported by substantial evidence.

c. Founded upon essential findings of fact lending rational support to the conclusion reached.

d. Free from any error of law.

e. Free from abuse of discretion or power by the Commission.

37. In failing to dismiss the complaints.

Dated January 24, 1946.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Washington, D. C.
Attorney for Interstate Commerce Commission.

370 In the District Court of the United States

Civil Action 45-C-865

Civil Action 45-C-866

Civil Action 45-C-1020

[Titles Omitted.]

Order allowing appeal

January 24, 1946

In the above-entitled consolidated causes, the Interstate Commerce Commission, one of the defendants therein, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered November 26, 1945, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided;

371 It is ordered and decreed, that the appeal be, and the same is hereby allowed as prayed for;

And it is further ordered, that the Clerk of Court transmit to the United States Supreme Court, as part of the record herein, the original papers, in lieu of copies thereof, as may be designated by appellant's and appellees' praecipes for transcript of the record filed pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States.

Dated January 24, 1946.

By IGOE,
United States District Judge.

372 [Citation in usual form showing service on Edward B. Hayes, et al., filed Jan. 24, 1946, omitted in printing.]

376 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Motion for order enlarging time for docketing the case and filing the record thereof with the clerk of the Supreme Court

Filed Jan. 24, 1946

Now comes the Interstate Commerce Commission, defendant-appellant in the above causes, and moves the Court, pursuant to Rule 11, paragraph 1, of the Revised Rules of the Supreme Court, to enlarge the time for docketing the appeal and the filing of the record thereof in the Supreme Court of the United
375 States, and in support of said motion respectfully shows:

1. That record in these causes is voluminous consisting not only of the proceedings in the hearings in these causes but including also the transcript of hearings before the Interstate Commerce Commission and numerous exhibits in the protracted proceeding out of which these causes grew.

2. The preparation of this record and its transmission to the Clerk of the Supreme Court of the United States cannot conveniently be accomplished within the time fixed by the Revised Rules of the Supreme Court of the United States.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorneys for Interstate Commerce Commission.

Order.

Upon motion of the Interstate Commerce Commission, defendant-appellant, and good cause having been shown,

It is ordered, That the time for docketing the case and the filing of the record thereof, in the Supreme Court of the United States, be and the same is hereby enlarged for further period of 30 days from the return day of the citation on appeal.

Dated January 24, 1946.

IGOE,
United States District Judge.

378 CERTIFICATE OF SERVICE

I hereby certify that I served the above motion and order by mailing copies thereof to each of the attorneys for appellees addressed as follows: Edward B. Hayes, Esq., 2400 Field Building, Chicago 3, Ill., Attorney for A. L. Mechling, Appellee. Luther M. Walter, Esq., 2106 Field Building, Chicago 3, Ill., Attorney for Inland Waterways Corporation, Appellee. James K. Knudson, Esq., Department of Agriculture, Washington, D. C., Attorney for the Secretary of Agriculture and War Food Administrator, Appellees.

DANIEL H. KUNKEL,
Attorney for Interstate Commerce Commission.

380 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Praecipe for transcript of record

Filed Jan. 24, 1946

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled consolidated causes to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint and exhibits attached thereto in 45–C–865.
2. Complaint and exhibits attached thereto in 45–C–866.

381 3. Complaint and exhibits attached thereto in 45–C–1020.

4. Intervention and Answer of Interstate Commerce Commission in 45–C–865.

5. Answer of Interstate Commerce Commission in 45–C–866.
6. Intervention and Answer of Interstate Commerce Commission in 45–C–1020.
7. Motion for temporary restraining order and affidavit in support thereof.
8. Temporary restraining order entered October 4, 1945.
9. Transcript of record of final hearing on the merits on October 16, 1945, together with exhibits introduced in evidence including record before Interstate Commerce Commission in I. & S. 4718, Grain Proportionals, Ex-Barge to Official Territory.
10. Findings of Fact and Conclusions of Law filed November 26, 1945.
11. Final decree entered November 26, 1945.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Citation on appeal.
16. Statement directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.
17. Motion and order enlarging the time for docketing the appeal and filing the record with the Clerk of the Supreme Court of the United States.
18. This praecipe.

Dated January 24, 1946.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorneys for Interstate Commerce Commission.

CERTIFICATE OF SERVICE

382 I hereby certify that I served the above praecipe by mailing copies thereof to each of the attorneys for appellees addressed as follows: Edward B. Hayes, Esq., 2400 Field Building, Chicago 3, Ill., Attorney for A. L. Mechling, Appellee. Luther M. Walter, Esq., 2106 Field Building, Chicago 3, Ill., Attorney for Inland Waterways Corporation, Appellee. James K. Knudson, Esq., Department of Agriculture, Washington, D. C., Attorney for the Secretary of Agriculture and War Food Administrator, Appellees.

DANIEL H. KUNKEL,
Attorney for Interstate Commerce Commission.

384 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Plaintiffs' (Appellees') praecipe and designation of additional portions of the record desired to be included in the transcript of record on appeal

Filed Feb. 1, 1946

To the Clerk of the above-named Court:

You are hereby requested in preparing the transcript of the record in the above-entitled causes to be filed in the Supreme Court of the United States pursuant to the appeal allowed therein to include in such transcript the following portions of the record in addition to those indicated by the defendant (appellant), to wit:

1. Answer of United States of America in 45–C–865.
2. Answer of United States of America in 45–C–866.
3. Answer of United States of America in 45–C–1020.
4. All affidavits in support of motion for temporary injunction.
5. Transcript of hearing on motion for temporary injunction, together with evidence and exhibits offered in support thereof.
6. Any motions to dismiss or affirm, any oppositions thereto and any orders thereon.
7. The order consolidating said causes.
8. This designation of additional portions of the record.

Edward B. Hayes.
EDWARD B. HAYES,
Room 2400 Field Building, Chicago 3, Illinois, Attorney for A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, Plaintiff (Appellee).

Luther M. Walter,
LUTHER M. WALTER,
Room 2106 Field Building, Chicago 3, Illinois, Attorney for Inland Waterways Corporation, Plaintiff (Appellee).

James K. Knudson,
JAMES K. KNUDSON,
Department of Agriculture, Washington, D. C., Attorney for Secretary of Agriculture and War Food Administrator, Plaintiff (Appellee).

385 CERTIFICATE OF SERVICE

I hereby certify that I served the above praecipe and designation of additional portions of the record desired to be included in the transcript of record on appeal by mailing copies thereof to the attorneys for appellant addressed as follows: Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Interstate Commerce Commission Building, Washington 25, D. C. Daniel H. Kunkel, Attorney for Interstate Commerce Commission, Interstate Commerce Commission Building, Washington 25, D. C.

Edward B. Hayes,
EDWARD B. HAYES,
Attorney for A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, Plaintiff (Appellee).

Dated February 1, 1946.

387 In the District Court of the United States

Civil Action 45-C-865

Civil Action 45-C-866

Civil Action 45-C-1020

[Titles omitted.]

Order

February 4, 1946

Upon motion of the plaintiffs and appellees herein, and good cause having been shown;

It is ordered that the time within which praecipe or designation of additional matters to be included in the transcript on appeal or any supplement or amendment thereof, together with proof of service thereof, is hereby extended to and including February 28, 1946.

Enter:

IGOE,
United States District Judge.

Dated February 4th, 1946.

389 In the District Court of the United States

Civil Action 45-C-865

Civil Action 45-C-866

Civil Action 45-C-1020

[Title omitted.]

Order to show cause

February 12, 1946

This matter coming on for hearing upon the motion of the United States for service upon the Interstate Commerce Commission, intervening defendant in the above-captioned cases, of an order to show cause why the United States should not be designated as a party to the appeal attempted to be taken by the Commission on January 24, 1946, in the said cases, and served with appeal papers therein as required by law, and after hearing thereon, for an order designating the United States as a party to the said appeal and requiring the Commission to serve upon the United States all appeal papers required to be served upon it in appeals taken from judgments entered in cases brought to set aside orders of the Commission; the Court having considered the motion and examined the records maintained by the Clerk
390 in each of the said cases; and being fully advised in the premises,

It is hereby ordered and adjudged, That the Interstate Commerce Commission show cause before me on February 21st, 1946, at 10 o'clock A. M., Court Room No. 627, United States Courthouse, Chicago, Illinois, why the United States should not be designated as a party to the appeal attempted to be taken by the Commission on January 24, 1946, in the said cases and should not be served with appeal papers therein as required by law, and why an order should not be entered by this Court designating the United States as a party to the said appeal and requiring the Commission to serve upon the United States all appeal papers required to be served upon it in appeals taken from judgments entered in cases brought to set aside orders of the Commission; and

It is further ordered and adjudged, That the motion for an order to show cause filed by the United States and this order be served upon counsel of record for the Interstate Commerce Commission in the said cases, more than 4 days in advance of the time fixed herein for hearing upon this order, by mailing to them by the United States registered mail true copies of the said motion

and order at their addresses as shown by the records in the cases kept by the clerk.

By MICHAEL L. IGOE,
United States District Judge.

Dated this 12 day of February 1946.

391 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Order

February 21, 1946

This matter coming on for hearing upon the order heretofore issued and served upon the Interstate Commerce Commission in the above-captioned cases to show cause why the United States should not be designated as a party to the appeal heretofore taken on January 24, 1946; arguments having been heard and the court being fully advised in the premises,

392 It is hereby ordered, that the Interstate Commerce Commission serve upon the United States true copies of the order allowing appeal, citation on appeal directed to the United States, and all other papers required by law to be served upon parties to appeals on or before February 26, 1946, and the order allowing appeal and citation on appeal are hereby amended accordingly.

IGOE,
United States District Judge.

Dated February 21st, 1946

394 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Plaintiffs' (Appellees') supplemental praecipe and designation of additional portions of the record desired to be included in the transcript of record on appeal

Filed February 25, 1946

To the Clerk of the above-named Court:

You are hereby requested in preparing the transcript of the record in the above-entitled causes to be filed in the Supreme Court

of the United States, pursuant to the appeal allowed therein,
395 to include in such transcript the following portions of the record in addition to those indicated by the defendant (appellant) and by the praecipe filed herein by the plaintiffs (appellees) on the 1st day of February 1946.

1. Order entered on February 4, 1946, extending time for filing praecipe or designation of additional matters to be included in transcript on appeal or any supplement or amendment thereof to and including February 28, 1946.

2. Order entitled Order to Show Cause entered on February 12, 1946.

3. Order entered February 21, 1946, upon the return of the Order to Show Cause next above mentioned.

4. This supplemental praecipe.

Edward B. Hayes,
EDWARD B. HAYES,

Room 2400 Field Building, Chicago 3, Illinois, Attorney for A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, Plaintiff (Appellee).

Luther M. Walter,
LUTHER M. WALTER,

Room 2106 Field Building, Chicago 3, Illinois, Attorney for Inland Waterways Corporation, Plaintiff (Appellee).

James K. Knudson,
JAMES K. KNUDSON,

Department of Agriculture, Washington, D. C., Attorney for Secretary of Agriculture and War Food Administrator, Plaintiff (Appellee).

396 CERTIFICATE OF SERVICE

I hereby certify that I served the above supplemental praecipe and designation of additional portions of the record desired to be included in the transcript of record on appeal by mailing copies thereof to the attorneys for appellant addressed as follows: Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Interstate Commission Building, Washington 25, D. C. Daniel H. Kunkel, Attorney for Interstate Commerce Commission, Interstate Commerce Commission Building, Washington 25, D. C.

EDWARD B. HAYES,
EDWARD B. HAYES,

Attorney for A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, Plaintiff (Appellee).

Dated February 25, 1946.

398 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Supplemental assignment of errors

Filed February 28, 1946

In addition to the assignment of errors heretofore filed with the petition for appeal, the Interstate Commerce Commission assigns as error the following:

The Court erred:

1. In entertaining, considering and passing upon motion of the United States for rule to show cause why it should not be made party to the appeal and served with the appeal papers.

399 2. In entering its order of February 21, 1946, upon said motion.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorneys for Interstate Commerce Commission.

Dated, February 26, 1946.

401 In the District Court of the United States

Civil Action 45–C–865

Civil Action 45–C–866

Civil Action 45–C–1020

[Titles omitted.]

Supplemental Praecipe

Filed February 28, 1946

To the Clerk of the above-named Court:

In addition to the papers heretofore designated by appellant under date of January 24, 1946, will you include in the transcript of the record to be transmitted to the Clerk of the Supreme Court of the United States the following:

1. Appellees' statement opposing jurisdiction and motion to dismiss and affirm.

402 2. Memorandum of the Interstate Commerce Commission in opposition to the said statement.

3. Motion of the United States for rule to show cause why it should not be served with the appeal papers.

4. Order of Court of February 21, 1946, upon said motion.

5. Supplemental assignment of errors and proof of service filed herewith.

6. This supplemental praecipe.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorneys for Interstate Commerce Commission.

Dated, February 26, 1946.

403 [Clerk's certificate to foregoing transcript omitted in printing.]

404 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of record to be printed

Filed April 9, 1946

Appellant Interstate Commerce Commission, pursuant to Rule 13, paragraph 9, states that it will rely upon the points made in its assignment of errors and for the purpose of enabling this Court to consider said points designates the following parts of the record to be printed:

Appellant's praecipe for transcript of record: Item 1; Items 2 and 3, except exhibits attached to the complaint; Items 4 to 8, inclusive; Item 9, except that portion of the record before the Interstate Commerce Commission in I. & S. 4718, Grain Proportionals Ex-Barge to Official Territory, made prior to June 13, 1943; Items 10 to 18, inclusive.

Appellant's supplemental praecipe: Items 3, 4, and 5.

Dated April 9, 1946.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorney for Appellant.

405 CERTIFICATE OF SERVICE

It is hereby certified that a copy of the above was this day served upon counsel for appellees by mailing the same to them addressed as follows: Edward B. Hayes, Esq., 2400 Field Building, Chicago 3, Ill., Attorney for A. L. Mechling, Appellee. Luther M. Walter, Esq., 2106 Field Building, Chicago 3, Ill., Attorney for Inland Waterways Corporation, Appellee. James K. Knudson, Esq., Department of Agriculture, Washington, D. C., Attorney for the Secretary of Agriculture, Appellee. The Attorney General of the United States, Department of Justice, Washington 25, D. C., Appellee.

Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorney for Appellant.

408 In the Supreme Court of the United States

Appellee United States' designation of additional parts of record to be printed

Filed April 20, 1946

Appellee United States designates for printing the following parts of the record transmitted by the clerk of the District Court of the United States for the Northern District of Illinois, to the Clerk of the Supreme Court of the United States, in addition to those parts heretofore designated by appellant Interstate Commerce Commission:

The entire record in the District Court, including pleadings, docket entries, findings of fact, conclusions of law and decree of the Court, stenographer's transcript of proceedings at the trial, and all exhibits received in evidence in the District Court, including in particular the entire record of proceedings before the Interstate Commerce Commission, including all exhibits received in evidence by the Commission.

April 19, 1946.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

409 I hereby certify that a true copy of the foregoing appellee United States' designation of additional parts of record to be printed was mailed this day to: Daniel W. Knowlton, Esq., Chief Counsel, Interstate Commerce Commission, Washington 25, D. C. Daniel H. Kunkel, Esq., Attorney, Interstate Commerce Commission, Washington 25, D. C., Counsel for Interstate

Commerce Commission, Appellant. Edward B. Hayes, Esq., 2400 Field Building, Chicago 3, Illinois, Counsel for A. L. Mechling, Appellee. Luther M. Walter, Esq., 2106 Field Building, Chicago 3, Illinois, Counsel for Inland Waterways Corporation, Appellee. James K. Knudson, Esq., Department of Agriculture, Washington, D. C., Counsel for the Secretary of Agriculture, Appellee.

Dated this 19 day of April 1946.

David O. Mathews,
DAVID O. MATHEWS,
Special Assistant to the Attorney General,
Department of Justice, Washington 25, D. C.

410 In the Supreme Court of the United States

Stipulation as to record

Filed September 26, 1946

In lieu of the designations of parts of the record to be printed heretofore filed by parties to the above appeal, it is hereby stipulated and agreed as follows by and between all parties to the said cause:

I. The following matters contained in the record on appeal shall be printed as Volume 1 of the printed record:

1. Complaint and exhibits attached thereto in 45C865 (appellant's praecipe, Item 1).

2. Complaint in 45C866, excluding exhibits (appellant's praecipe, Item 2).

3. Complaint and exhibits attached thereto in 45C1020 (appellant's praecipe, Item 3).

4. Intervention and answer of Interstate Commerce Commission in 45C865 (appellant's praecipe, Item 4).

5. Answer of Interstate Commerce Commission in 45C866 (appellant's praecipe, Item 5).

6. Intervention and answer of Interstate Commerce Commission in 45C1020 (appellant's praecipe, Item 6).

7. Answer of the United States in 45C865 (appellees' praecipe, Item 1).

8. Answer of United States in 45C866 (appellees' praecipe, Item 2).

9. Answer of United States in 45C1020 (appellees' praecipe, Item 3).

10. Motion for temporary restraining order and affidavit in support thereof (appellant's praecipe, Item 7).

11. All affidavits in support of motion for temporary injunction (appellees' praecipe, Item 4).

12. Transcript of hearing on motion for temporary injunction together with evidence and exhibits offered in support thereof (appellees' praecipe, Item No. 5).

13. Temporary restraining order entered October 4, 1945 (appellant's praecipe, Item 8).

14. Order consolidating the causes (appellees' praecipe, Item 7).

15. Transcript of record of final hearing on the merits on October 16, 1945, excluding exhibits (appellant's praecipe, Item 9).

16. Findings of fact and conclusions of law filed November 26, 1945 (appellant's praecipe, Item 10).

17. Final decree entered November 26, 1945 (appellees' praecipe, Item 11).

18. Petition for appeal (appellees' praecipe, Item 12).

19. Assignment of errors (appellees' praecipe, Item 13).

20. Order allowing appeal (appellant's praecipe, Item 14).

21. Citation on appeal (appellant's praecipe, Item 15).

22. Statement directing attention to paragraph 3 of Rule 12 and proof of service (appellant's praecipe, Item 16).

23. Motion and order enlarging time for docketing appeal, etc. appellant's praecipe, Item 17).

412 24. Appellant's praecipe (appellant's praecipe, Item 18).

25. Appellees' praecipe (appellees' praecipe, Item 8).

26. Order of February 4, 1946, extending time for filing praecipe, etc. (appellees' supplemental praecipe, Item 1).

27. Order entitled "Order to Show Cause," entered February 12, 1946 (appellees' supplemental praecipe, Item 2).

28. Order entered February 21, 1946, upon return of order to show cause (appellees' supplemental praecipe, Item 3).

29. Appellees' supplemental praecipe (appellees' supplemental praecipe, Item 4).

30. Supplemental assignment of errors and proof of service (appellant's supplemental praecipe, Item 5).

31. Appellant's supplemental praecipe (appellant's supplemental praecipe, Item 6).

II. There shall be printed as further volumes of the printed record such portions of the complete record of the proceedings before the Interstate Commerce Commission as shall be specified by subsequent stipulation of the parties to this appeal or by such amended designations of parts of the record to be printed as may hereafter be filed, by the appellees who have heretofore filed designations of parts of the record to be printed, following receipt by them of appellant's brief, which appellant agrees to furnish on or before September 20, 1946, or by order of the Court upon appellant's motion heretofore filed for diminution of the record.

III. Any party may make reference in brief or argument to any matter in the record on appeal, whether printed or not.

IV. It is further stipulated and agreed that Items 1 and 2 of appellant's supplemental praecipe shall be eliminated from and not deemed a part of the record on appeal, the same not having been part of the record in the district court.

This 2d day of August 1946.

413 J. Howard McGrath,
J. HOWARD McGRATH,
Solicitor General for United States of America,
Appellee.

JAMES A. DOYLE,
For Secretary of Agriculture and War Food Administrator,
Appellee.

EDWARD B. HAYES,
For A. L. Mechling,
Appellee.

NUEL D. BELNAP,
For Inland Waterways Corporation,
Appellee.

DANIEL H. KUNKEL,
For Interstate Commerce Commission,
Appellant.

414 Supreme Court of the United States

Order noting probable jurisdiction

April 29, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice JACKSON took no part in the consideration or decision of this question.

[Endorsement on cover:] Enter Daniel W. Knowlton. File No. 50713. Northern Illinois, D. C. U. S. Term No. 72, The Interstate Commerce Commission, Appellant *vs.* A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, Inland Waterways Corporation, The Secretary of Agriculture, War Food Administrator and the United States of America. Filed March 27, 1946. Term No. 72 O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946

No. 1010, 72

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT

vs.

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, WAR FOOD ADMINISTRATOR, AND THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action 45 C–865

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Civil Action 45 C–866

INLAND WATERWAYS CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil Action 45 C–1020

THE SECRETARY OF AGRICULTURE AND WAR FOOD ADMINISTRATOR, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

JURISDICTIONAL STATEMENT BY DEFENDANT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The Interstate Commerce Commission, one of the defendants in the above consolidated causes, respectfully presents the following statement dis-

closing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled causes sought to be reviewed.

A. Statutory provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C. Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C. Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C. Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. The statute of a State, or the statutes or treaty of the United States, the validity of which is involved

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

C. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented

The decree sought to be reviewed was entered on November 26, 1945. The petition for appeal was presented and allowed on January 23, 1946, together with the assignment of errors.

D. Nature of case and the rulings below

This is an appeal from the decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered November 26, 1945, enjoining in part, the operation and effect of an order of the Interstate Commerce Commission, dated February 13, 1945, in the proceedings known as Investigation & Suspension Docket No. 4718, *Grain Proportionals Ex Barge to Official Territory*, 262 I. C. C. 7. These proceedings had their origin in the filing of proposed tariffs by certain eastern railroads[1] the effect of which would have been to subject grain arriving

[1] Baltimore & Ohio Railroad Company, New York Central Railroad Company, New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, Erie Railroad Company, and the Chesapeake & Ohio Railway Company.

at Chicago by barge over the Illinois Waterways to the use of existing local rates for outbound rail movement to eastern destinations and to deny to such grain the use of proportional rates applicable to grain arriving at Chicago by lake steamer or rail, which latter were in all cases lower than the existing local rates. Pursuant to its authority under section 15 (7) of the Interstate Commerce Act, the Commission suspended the proposed tariffs and entered upon a hearing of their lawfulness which culminated in its report and order of December 1, 1941, 246 I. C. C. 353, whereby it vacated the order of suspension and discontinued the proceedings. This order was the subject of two complaints filed in this Court, Civil Action, File Nos. 3714 and 3725, respectively. Following consolidation, hearing and submission, this court on April 16, 1942, enjoined and set aside the order of the Commission of December 1, 1941, from which action appeal was taken to the Supreme Court of the United States. That Court by opinion rendered June 14, 1943 (*Interstate Commerce Commission* v. *Inland Waterways Corporation,* 319 U. S. 671), held that the Commission had acted within the power delegated to it by law and reversed the judgment of the court below. In so doing the Supreme Court interpreted the Commission's report and order as not constituting an approval or prescription of the rates under suspension but found that there had been left open, upon a proper record,

the prescription by the Commission of proportional rates on the ex-barge traffic lower than the local rates or joint barge-rail rates lower than the combinations.

Following this decision of the Supreme Court petitions for rehearing were filed with the Commission and on July 13, 1943, the Commission reopened the proceedings for the purpose of receiving evidence on the question of whether or not proportional rates should be prescribed on the traffic in question, or what, if any, joint rates should be prescribed. Thereafter hearing was had at which various parties appeared both in support and against the fixing of proportional rates on the ex-barge traffic higher than those accorded ex-lake and ex-rail traffic.

On February 13, 1945, the Commission issued its report and order (262 I. C. C. 7) the validity of which is here in issue. The Commission concluded that the ex-barge traffic is entitled to proportionals lower than the local rates, but that such proportionals may properly vary from the ex-rail and ex-lake proportionals to the extent warranted by the differences surrounding the all-rail and lake-rail transportation, on the one hand, and the barge-rail transportation on the other. The report then found that the scale of differentials therein specified of ex-barge proportional rates under existing local rail rates would be reasonable and not otherwise unlawful for the interstate transportation of ex-barge grain from Chicago to

the eastern destinations considered. These differentials would result in ex-barge proportionals higher than the ex-rail or ex-lake proportionals but lower than the local rail rates which the proposed tariffs woud have required. The order of the Commission did not direct the respondent rail carriers to file tariffs establishing the ex-barge proportionals specified but merely directed the cancellation of the proposed tariffs which would have applied the local rail rates to this traffic.

In compliance with this order the respondent rail carriers on June 1, 1945, filed tariffs cancelling the proposed tariffs and at the same time proposed to put in effect on October 5, 1945, the ex-barge proportional rates which the Commission had found would not be unreasonable or otherwise unlawful.

On June 1, 1945, complaints against the United States as statutory defendant were filed by A. L. Mechling, trading under the name of Mechling Barge Line (45 C–865) and Inland Waterways Corporation (45 C–866), and on June 27, 1945, by the Secretary of Agriculture and War Food Administrator (45 C–1020), all pursuant to provisions of section 41 (28) and sections 43 to 48, inclusive, of Title 28 U. S. C. The Interstate Commerce Commission was made a defendant in the Inland Waterways Corporation complaint and intervened as defendant in the other two complaints pursuant to sections 212 and 213 of the

Judicial Code as amended. None of the respondent rail carriers was named defendant in any of the complaints, nor did any of them intervene in the proceedings in this court. The United States, through the antitrust division of the Department of Justice filed its several answers to the complaints confessing error as alleged in the several complaints and joining in the prayers for relief. The Interstate Commerce Commission filed answers denying each and every allegation of error and thus issue was joined. By order of the district court the three complaints were consolidated for hearing and disposition.

The complaints centered their attack upon that portion of the Commission's report which approved the establishing of the designated differentials on the rail transportation of ex-barge grain from Chicago to the eastern destinations. The relief sought was an injunction restraining and setting aside the operation and effect of the order insofar as it approved and authorized the establishing of these differentials.

On October 4, 1945, the matter came on for hearing upon application for relief *pendente lite* and on the same day the court entered an order suspending the operation and effect of the order of the Commission of February 13, 1945, for a period of sixty days, insofar as it authorized the imposition of the basis of rail charges therein approved for the transportation of ex-barge grain out of Chicago, Illinois, that would be differen-

tially less favorable to ex-barge grain than the rates presently in effect, restraining the Commission from permitting to become effective any tariffs that had been or might be published in conformity with the order of the Commission, including the tariffs to have become effective October 5, 1945, and enjoining the Commission forthwith to take all steps needful faithfully to observe these restraints including the suspension of said tariff publications.

Acting under compulsion of this order the Commission on October 4, 1945, suspended the operation of the tariffs of the respondent rail carriers which were to have become effective October 5, 1945.

The causes were heard on final hearing on October 16, 1945, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220). After the voluminous record before the Commission, made after extensive hearings, had been offered by plaintiffs and received in evidence, the court announced that it desired to hear from the Commission in support of the order in issue. Thereupon the Commission argued the validity of the order based upon the findings contained in the Commission's report and the assertion of statutory power based thereon. Upon the conclusion of the Commission's presentation, the court orally announced its opinion and judgment that the order of the

Commission was in violation of section 3 (4) of the Interstate Commerce Act and of the National Transportation Policy insofar as it authorized proportional rail rates for the transportation of ex-barge grain from Chicago to eastern destinations differentially higher than those in effect for the transportation of ex-rail and ex-lake grains. Plaintiffs were thereupon directed to submit findings of fact, conclusions of law, and final decree carrying into effect the oral judgment so announced.

On November 26, 1945, the court, without rendering a written opinion, filed findings of fact and conclusions of law, in the form submitted by plaintiffs, and entered its final decree which enjoined the order of February 14, 1945, insofar as it approved or authorized a rate for transporting ex-barge grain east from Chicago that is higher than any rate contemporaneously exacted for the transportation of like ex-rail or ex-lake grain, and restrained the Commission from taking any action, the effect of which would be to sanction or permit to become effective any rail rates for the transportation of ex-barge grain from Chicago to eastern destinations that are in any way predicated upon the authority of said order of February 13, 1945. The decree also remanded the cause to the Commission for further proceedings in conformity with the findings and conclusions of the court.

The questions presented by this appeal are

substantial ones. First of all there is present the question of whether or not the plaintiffs had exhausted their administrative remedies so as to perfect jurisdiction in the district court to entertain these suits. Secondly, it involves the respective powers of the court and the Commission in determining administrative matters of fact where issues of unjust discrimination and undue prejudice are raised. And finally there is involved the extent of the Commission's power and authority in administering the provisions of the Interstate Commerce Act in the light of the national transportation policy to authorize rate adjustments based upon differentiating transportation conditions. The ultimate determination upon the merits of this controversy is likewise important in that it will affect large interests over a broad territory and the movement of large volumes of grain and grain products.

E: Cases sustaining the Supreme Court's jurisdiction of the appeal

Interstate Commerce Commission v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14;

United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454;

United States v. *Lowden*, 308 U. S. 225;

Hudson & Manhattan Railroad Co. v. *United States*, 313 U. S. 68; and

Interstate Commerce Commission v. *Inland Waterways Corporation*, 319 U. S. 671.

F. Decree and findings of fact and conclusions of law of the District Court

Appended to this statement is a copy of the findings of fact and conclusions of law of the District Court and a copy of the decree of said court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court has jurisdiction of the appeal.

Dated, January 23, 1946.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.

Daniel H. Kunkel,
DANIEL H. KUNKEL,
Attorneys for Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1946

APPENDIX

IN THE

District Court of the United States

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

A. L. MECHLING, doing business under the trade name and style of A. L. MECHLING BARGE LINE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.
INTERSTATE COMMERCE COMMISSION,
Intervening Defendant.
} Civil Action File No. 45 C 865

INLAND WATERWAYS CORPORATION,
Plaintiff,
vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.
} Civil Action File No. 45 C 806

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES and the WAR FOOD ADMINISTRATOR,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.
INTERSTATE COMMERCE COMMISSION,
Intervening Defendant.
} Civil Action File No. 45 C 1020

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on to be heard and the court having heard arguments of counsel and being advised in the premises now makes the following

FINDINGS OF FACT

(1) A. L. Mechling, doing business under the trade name and style of A. L. Mechling Barge Line, plaintiff in Civil Action No. 45 C 865, hereinafter called "Mechling," is a common carrier by water subject to Part III of the Interstate Commerce Act operating a barge line on the Illinois River and Waterway and the Mississippi River, by means of which he transports grain in interstate commerce from various ports on said waters to Chicago, Illinois, for reshipment at Chicago to interstate and foreign destinations located easterly therefrom.[1]

(2) Inland Waterways Corporation, operating Federal Barge Lines, plaintiff in Civil Action No. 45 C 866, hereinafter referred to as "Federal," is a common carrier by water subject to Part III of the Interstate Commerce Act operating a barge line on the Illinois River and Waterway and Mississippi and Missouri rivers, by means of which it transports grain in interstate commerce from various ports on said waters to Chicago for reshipment at Chicago to interstate and foreign destinations located easterly therefrom.

(3) The Secretary of Agriculture of the United States, one of the plaintiffs in Civil Action No. 45 C 1020, is a duly appointed cabinet officer of the President of the United States of America in charge of the Department of Agriculture, and is authorized to make complaints to the Interstate Commerce Commission, hereinafter referred to as the Commission, with respect to rates, charges, tariffs, and practices relating to the transportation of farm products and to prosecute the same

[1] Mechling has been certificated as such by the Interstate Commerce Commission in collateral proceedings.

before the Commission and to appear as a party in original and appellate judicial proceedings involving the Commission's determination. The War Food Administrator, the other plaintiff in Civil Action No. 45 C 1020, is a duly appointed officer of the United States similarly authorized. Said War Food Administrator is also authorized to formulate and carry out a program designed to furnish a supply of food adequate to meet military, civilian, and foreign requirements, both for human and animal consumption and for industrial uses, and to take all appropriate steps to insure the efficient and proper disposition of the available supply of food.

(4) Grain is also transported to Chicago, Illinois, by rail[2] and by lake steamer for reshipment to interstate and foreign destinations lying easterly of Chicago.

(5) The Western Railroads so transporting grain to Chicago serve, among many others, most of the origins served by the barge lines in this grain traffic to Chicago and compete with the barge lines for the grain brought to Chicago.

(6) The lake steamers bring grain to Chicago from various ports on the Great Lakes, of which Duluth, Minnesota, is the most important in respect to domestic grain. At times, said lake steamers also bring substantial quantities of foreign grain to Chicago, both from Canada and from other continents, said latter grain being imported via the St. Lawrence Waterway.

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[2] The Western Railroads, whose lines end at Chicago, include the Alton Railroad, Atchison, Topeka & Santa Fe Railroad, Chicago, Burlington & Quincy Railroad, Chicago & North Western Railroad, Chicago, Great Western Railroad, Chicago, Milwaukee, St. Paul & Pacific Railroad, Chicago, Rock Island & Pacific Railroad, Illinois Central Railroad, New York Central Railroad and Wabash Railroad.

(7) The grain so brought to Chicago by rail, lake steamers, and barge is transported therefrom to interstate and foreign destinations lying easterly thereof by the Eastern Railroads[3] which were the respondents and defendants in the proceeding before the Commission known as *Grain Proportionals, Ex-Barge to Official Territory, I. & S. Docket 4718*, in which was issued the order sought to be enjoined in this cause. The incoming lines of the Western Railroads, and the plaintiff barge lines, are connecting lines of carriers, as defined by Section 3(4) of Part I of the Interstate Commerce Act, of the Eastern Railroads via which said grain is shipped out of Chicago.

(8) Typically, this grain is temporarily stored on arrival at Chicago in elevators from which it is delivered into the cars of the Eastern Railroads for out-movement to the east. The movement of grain from the west through the Chicago elevators to the east is one of the conspicuous national streams of interstate commerce. Chicago is the greatest grain reshipping point in the world.[4]

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[3] The Eastern Railroads include, for example, the Baltimore & Ohio Railroad Company, Erie Railroad, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, and the Chesapeake and Ohio Railway Company.

[4] Appendices to the reports of the Commission in the proceeding in which was entered the order sought to be enjoined in this cause show by years the receipts and shipments of grain from Chicago according to species and mode of transportation. (246 I.C.C. 353, *383*; 262 I.C.C. 7, *41*) For the period from 1933, when movement of grain by barge to Chicago was resumed upon completion of the Illinois Waterway, through the first ten months of 1943, the totals of such yearly figures are as follows:

GRAIN RECEIVED AT AND SHIPPED FROM CHICAGO

Grain Receipts (in thousands of bushels)

	By Rail	By Barge	By Lake	Total
Corn	773,897	85,191	23,170	882,258
Wheat	251,419	12,024	18,063	281,506
Oats	210,616	2,470	8,237	221,323
Soybeans	97,500	2,948	120	100,568
Total grain	1,333,432	102,633	49,590	1,485,655

Grain Shipments (in thousands of bushels)

Corn	288,100	200	272,077	560,377
Wheat	158,402	888	83,376	242,666
Oats	177,574	368	17,263	195,205
Soybeans	22,200	...	17,838	40,038
Total grain	646,276	1,456	390,554	1,038,286

The tariffs and the trade treat soybeans as grain, and as used herein grain includes soybeans. Other kinds of grain are received at Chicago besides that shown in these figures.

The grain received at Chicago by lake inbound comes principally from Duluth, Minnesota, although during the period covered by the above table substantial quantities of foreign grain were also received via lake at Chicago. The lake shipments from Chicago outbound go primarily to Buffalo, New York, for reshipment by rail therefrom to destinations easterly thereof.

(9) Grain moving to and stored at Chicago in this stream of commerce is sold on the basis of delivered prices to Chicago dealers. The cost of the inbound transportation (as represented by freight rates and other incidental charges) is borne by the producer or shipper of inbound grain. The net price received by such producer or shipper varies inversely with the amount of the inbound transportation cost so that the benefit of any lowered cost of inbound transportation accrues directly to the producer and inbound shipper. The deliv-

ered prices so paid by Chicago dealers are uniform, regardless of the mode, cost or length of inbound transportation, so long as the grain purchased is treated on a parity with all other grain in respect to transportation charges assessed for outbound movements.

(10) All grain of like kind and grade comes to a common market value at Chicago, regardless of the cost, mode or length of inbound transportation. Such grain is sold by the Chicago dealers delivered at Eastern Destinations at the price represented by such Chicago market value, plus the cost of transporting such grain to said Eastern Destinations. The Chicago dealers sell the grain so purchased from the west at delivered prices based on such Eastern Destinations as Philadelphia, Pa., New York City, N. Y., and Boston, Mass. As a consequence, the reshipping rates are borne by the Chicago dealers. Such Chicago dealers are not able to bear or absorb greater outbound reshipping charges on grain brought to Chicago by a particular mode of transportation (such as those prescribed by the Commission in its order herein complained of), than they bear or absorb on grain brought to Chicago by other modes of transportation unless such grain has been purchased by them at a price reflecting a discount of similar amount to the amount by which the reshipping rate on the particular grain is greater than on other grain.

(11) The principal escape of all grain from Chicago to the east is via rail.[5] That is the only escape during a period of five months in the winter when navigation on the Great Lakes is closed. That is also the only escape at any time of year for very substantial volumes of grain sold to processors intermediate between Chi-

[5] See footnote 4, *supra*.

cago and Buffalo. In the case of rail-arrived grain, a substantial volume is disposed of by means of local sales at Chicago to processors there located. There is little, if any, sale at Chicago of the barge-arrived grain for local consumption or use, which fact is due to the charges made by railroads for switching the barge-arrived grain from waterfront elevators in Chicago to local grain processors.[6] Grain cannot come to Chicago by barge in substantial volume unless it can find escape to the east.[7]

(12) By far, the most important destinations for this grain east of Chicago are in New England and Eastern Trunk-Line territories, which include all territory east of a line drawn northward and southward through Pittsburgh, Pa., and Buffalo, N. Y., north of the Potomac River. For convenience, this territory is collectively referred to herein as "Eastern Territory" and destinations therein are collectively referred to as "Eastern Destinations." While some of this grain initially moves from Chicago to intermediate destinations west of said Buffalo-Pittsburgh line, for convenience called "Central Territory," it is nevertheless sold on the basis of delivered prices at destinations east thereof because it can be and is sent on from the intermediate destinations under transit to destinations in Eastern Territory, and the whole transportation movement east from Chicago paid for on the basis of the rate applicable to the movement from Chicago to final destination in East-

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[6] "At Chicago, the elevators are generally served by both rail and water, but local processors there can obtain rail delivery of barge grain only by the payment of a [rail] switching charge ranging from 3.25 to 4.5 cents per 100 pounds." 262 I.C.C. 7, 24.

[7] "Barge-rail grain is marketed but not processed at Chicago." 262 I.C.C. 7, 22.

ern Territory.[8] That rate is the only rate east from Chicago which then affects the transaction.

(13) Presently, and for many years, this grain arriving in Chicago by rail, lake, and barge has been transported by the Eastern Railroads in carloads from Chicago to all Eastern Destinations at the same basis of reshipping charges, which basis of charges is illustrated by the charge of 26 cents per hundred pounds from Chicago to New York.[9] These charges are called in the last report of the Interstate Commerce Commission (262 I.C.C. 7) "proportionals or specifics." Whatever they are called, and in whatever form they are published and exacted, they are the charge demanded and received by the Eastern Railroads for their service in transporting east from Chicago grain which has had an antecedent haul by rail, lake steamer, or barge. They have been made without reference to the length of inbound haul by rail, barge, or lake. A descriptive name (occurring in some rail tariffs) is "reshipping" rates or charges, and they will be so called herein.[10]

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[8] "In this proceeding, the rates to trunk-line and New England territories are by far the more important, as marketers and processors in central territory can and do transit under such rates." 262 I.C.C. 7, *15*.

[9] Rates are herein stated, as in the rail tariffs and the Commission's report, in cents per hundred pounds.

[10] There is but one level of reshipping rates from Chicago to Eastern Destinations (which are by far the more important here) and it is applicable from Chicago to all Eastern Destinations, whether the grain arrived in Chicago by rail, lake, or barge—and regardless of the origin of the grain west of Chicago. To the less important Central Territory destinations there are three levels of ex-rail reshipping rates dependent on the origin of the grain, each level applying to grain received from a particular origin territory, regardless of the length of the inbound haul. As to grain received from two of such origin territories, the ex-rail and ex-barge reshipping rates east from

(14) At the same times, the Eastern Railroads have published so-called "local" rates for transporting grain east from Chicago, considerably higher than the reshipping basis, and applicable on grain that has had no antecedent transportation to Chicago but originating in the Chicago switching district, called "local" grain. The local rate level is uniformly higher to all Eastern Destinations by 8.5 cents per hundred pounds, than the

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Chicago are identical. That is to say, there is an identity of rail reshipping charges out of Chicago on grain, regardless of whether it arrived in Chicago by rail, lake, or barge, as to all grain originating in the northwest (Northwest Territory—which includes all origins in North Dakota, South Dakota, Minnesota, Wisconsin, the Upper Peninsula of Michigan, Montana, Wyoming, Idaho, Oregon, Washington, and certain Canadian provinces). To these Central Territory destinations there is also the same identity of rail reshipping charges out of Chicago on grain, regardless of mode of inbound transportation, as to all grain originating west of the Mississippi (Trans-Mississippi Territory, which includes all origins west of the Mississippi other than Northwest Territory). As to grain originating in Illinois, the rail reshipping charges east from Chicago on rail-arrived grain (to Central Territory) differ from the other two reshipping levels just mentioned; but said reshipping level to Central Destinations is not applicable to barge-arrived grain from Illinois. As to such barge-arrived grain, the reshipping rates are the same as the reshipping rates on the ex-lake grain which in turn are the same as the reshipping rates on ex-rail grain from the Northwest. Those rates are in a few cases lower, but as a general level as high (and, to most such Central Territory destinations, higher) than the rail reshipping charges east from Chicago on the grain arriving there by rail from Illinois origins. These three different levels of reshipping charges from Chicago (to Central Territory) are not an adjustment of these outbound rates from Chicago which vary with the length of the inbound haul. Thereunder, grain from Iowa, just across the Mississippi River, takes the same reshipping rate out of Chicago to Central Territory destinations as grain from the Rocky Mountain region; and grain from Milwaukee, Wis., takes the same reshipping rate from Chicago to Central Territory destinations as grain from Canada.

reshipping rate level. The local rate level is illustrated by the local rate from Chicago to New York of 34.5 cents.[11]

(15) By a previous order, 248 I.C.C. 307 (entered on evidence taken before the Transportation Act of 1940 became effective), the Interstate Commerce Commission approved the Eastern Railroads putting into effect a proposal to cancel the application of the reshipping basis of rail charges as to all grain arrived in Chicago via the inland waterway by barge (called "ex-barge" grain) without changing the reshipping basis of rail charges on grain arrived in Chicago by rail or by lake (called, respectively, "ex-rail" and "ex-lake" grain), and leaving no rail rate applicable from Chicago to Eastern Destinations on ex-barge grain but the local rates, uniformly higher than the reshipping charges by 8.5 cents to all Eastern Destinations.[12] At the time the evidence was taken on which said order was entered, this transportation of grain to Chicago via barge was not subject to the Interstate Commerce Act and the Commission had held that said Act did not prohibit discrimination in rates and charges by railroads against a connecting unregulated water line, since at that time the said Act did not apply to port-to-port transportation by barge lines, and the prohibited discrimination in rates and charges by railroads against connecting lines embraced only discrimination against a connecting line

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[11] They are also applicable, for example, on grain that has lost its reshipping privilege, as by lying too long a time in Chicago without reshipment, and to grain arriving in Chicago via truck.

[12] To destinations in Central Territory the local rates exceeded the reshipping rate levels by varying amounts ranging from a few cents to 7.5 cents.

subject to Part I of the Interstate Commerce Act.[13] That order was contested in this Court and the Supreme Court of the United States, the latter court sustaining the Commission's order. The Eastern Railroads did not avail themselves of the said permission to make their said proposal effective.[14] After said proceedings in this Court and in the Supreme Court of the United States,[14a]

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[13] 246 I.C.C. 353, 363 and cases cited.

[14] "Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates, which, under the Commission's decision leaves them open to possible recovery of reparations." *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671.

[14a] The history of the proceedings in which was entered the order sought to be enjoined in this cause may be summarized as follows: The proposal of the Eastern Lines to make the reshipping basis from Chicago to the east inapplicable to ex-barge grain arriving at Chicago over the Illinois Waterways was published in tariffs filed with the Commission to become effective October 15, 1939. Various shipping interests and Federal filed protests against that proposal alleging that, if made effective, it would violate Sections 1, 2, and 3(1) of the Interstate Commerce Act. Thereupon, by order of October 14, 1939, said proposal was suspended by the Commission and an investigation instituted into the lawfulness thereof in a proceeding known as *Grain Proportionals, Ex-Barge to Official Territory, I. & S. Docket No. 4718.* Hearings in that investigation were complete in January 1940. On July 31, 1941, the Commission, Division 2, issued its report and order (246 I.C.C. 353) and found that the proposal had not been shown to be unlawful, that the suspension order should be vacated, and the proceeding discontinued as of August 30, 1941. Thereafter, upon petition of the plaintiffs and others, the Commission granted reconsideration (but denied rehearing) in said case, and on December 1, 1941, issued its report and order on reconsideration (248 I.C.C. 307) in which it stated that the proposed schedules had been shown to be just and reasonable and had not been shown to be otherwise unlawful, that the suspension order should be vacated, and the proceeding discontinued as of December 22, 1941. Thereafter, various

the Commission on petition of interested parties reopened the case by order set forth in the margin[15] and on February 13, 1945, entered a further

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parties and interests, including the plaintiffs in this cause and others, as plaintiffs or intervening plaintiffs, filed proceedings in this Court seeking to enjoin the said order of the Commission of December 1, 1941. This Court issued the injunction as prayed. On appeal, the Supreme Court of the United States reversed this Court and held that the order entered by the Commission in the proceeding before it involved no approval of proposed schedules and that the dismissal of the proceedings was within its authority under the circumstances of the case.

[15] The order of the Commission reopening the case before it for further hearing reads:

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 13th day of July, A. D., 1943.

I. & S. No. 4718.

GRAIN PROPORTIONALS, EX-BARGE TO OFFICIAL TERRITORY.

It appearing, That in the report of the Commission on reconsideration in the above-entitled proceeding, 248 I.C.C. 307, the Commission said that "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations."

It further appearing, That motions requesting leave to file petitions for rehearing and for an order fixing specific reshipping rates on ex-barge grain, together with such petitions, have been filed by Cargill, Incorporated; Continental Grain Company, Norris Grain Company; Rosenbaum Brothers; Santa Fe Elevator Corporation; and A. L. Mechling, doing business as A. L. Mechling Barge Line; and that said petitioners request rehearing for the purpose of presenting evidence which will permit the Commission to prescribe and fix reshipping rates on ex-barge grain predicated on the particular circumstances and conditions which surround its transportation;

order.[16] Therein and thereby the Commission disapproved and ordered canceled the said rate proposal. No one complains of that action. But by the same order

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It further appearing, That the said petitions in effect are complaints which bring in issue the lawfulness of rates applicable on the through movement of the traffic considered in the instant proceeding; and that the record therein may be of assistance in determination of the issues presented by said petitions.

And it further appearing, That the said petitions and replies thereto have been considered in the light of the record herein and the opinion of the Supreme Court of the United States in *Interstate Commerce Commission, et al.* v. *Inland Waterways Corporation, et al.*, decided June 14, 1943.

It is ordered, That this proceeding be, and it is hereby, reopened for further hearing for the purpose of receiving evidence (1) on the questions of whether or not reshipping or proportional rates should be prescribed for interstate transportation by railroad of ex-barge grain, in carloads, from Chicago, Ill., and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic, and (2) to determine what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by said A. L. Mechling, doing business as A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed.

And it is further ordered, That this proceeding be, and it is hereby assigned for further hearing on August 16, 1943, at 9:30 o'clock, a. m., at the Hotel Morrison, Chicago, Ill., before Examiner Fuller.

By the Commission:

(SEAL) W. P. BARTEL,
Secretary.

[16] It was stipulated that this order is as reproduced at pages 15 and following of the complaint of A. L. Mechling herein. The "report" (but not the order, which makes the said report, and prior reports of July 31 and December 1, 1941, a part of the order) is reported in 262 I.C.C. 7 and following.

the Commission prescribed a maximum basis of reshipping charges on all ex-barge grain from Chicago to destinations lying to the east thereof, that is higher than the basis of reshipping charges to be continued on ex-rail and ex-lake grain.[17] To all Eastern Destinations

[17] The Commission made its findings a part of its order and found (emphasis supplied):

"2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the Eastern destinations considered herein, under sections 1, 2, 3(1), 3(4), 6(11)(b), and 15a(2) of the Interstate Commerce Act, administered with a view to carrying out the national transportation policy, will be those made differentially under the local rail rates which are or may be hereafter concurrently maintained from Chicago, as set forth below, with the customary differentials on the products and export traffic, and which are no less favorable to the ex-barge traffic, **and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other.**

"Where local rail rate on grain is:	Differential, ex-barge under local rail rates shall be.
Cents	Cents
13-14	1
15-22	2
23-24	3
25-26	4
27-28	5
28.5 and over	5.5"

Said "prescribed ex-barge proportionals" (so prescribed by the Commission in terms of the higher local rates but in relation to the existing ex-rail and ex-lake reshipping charges) are uniformly 3 cents higher from Chicago to Eastern Destinations than what we have called the reshipping charges, which the Commission here calls "the present *ex-rail* and *ex-lake* proportionals or specifics," and which are, also, the present *ex-barge* reshipping rates.

the prescribed reshipping rates on ex-barge grain are uniformly three cents higher than the reshipping basis on all ex-rail and ex-lake grain. To Central Territory destinations, except in a relatively few instances, the prescribed reshipping rates on ex-barge grain are higher than the reshipping basis on ex-rail grain from the same origin, and higher than the reshipping basis on ex-lake grain from all origins.

(16) The Commission found nothing requiring it to order a change in the present equal treatment of ex-rail, ex-lake, and ex-barge grain in respect of the rail reshipping charges to Eastern Destinations. It did not require the Eastern Railroads to put into effect at any particular time the said 3 cent penalty basis of rail charges that it approved against the ex-barge grain in favor of ex-rail and ex-lake grain.[17a] But the Commission found that said penalty rate relation on ex-barge grain was reasonable and otherwise lawful and made such finding and prescribed rate basis a part of its order.[18] By said order the Commission authorized the Eastern Railroads to make said rate penalty effective, at their option and pleasure. Thereafter the Eastern Railroads on June 2, 1945, filed tariffs putting into effect the said prescribed penalty rate basis on ex-barge grain for the full amount of said 3 cent penalty, to become effective October 5, 1945, which tariffs recite on the face that they are "Issued in conformity with findings

[17a] "As the proposed schedules have not become effective because of the voluntary postponement by respondents of the effective date thereof, no order requiring establishment of the rates herein found lawful appears necessary at this time. An order will be entered requiring the cancelation of the proposed schedules, without prejudice to the filing of new schedules in conformity with the findings herein." (262 I.C.C. 7, *33*).

[18] Complaint of Mechling, pages 53, 72.

of the Interstate Commerce Commission in I. & S. Docket No. 4718 decided February 13, 1945," (which is the said order herein complained of) whereby, pursuant to said order, the reshipping rates from Chicago to Eastern Destinations will be increased by 3 cents on ex-barge grain, while the reshipping charges remain unchanged on ex-rail and ex-lake grain.[19]

(17) Consequences of the Commission's order are as follows:

(a) On grain, of like kind (including grain coming from identical shipping points west of Chicago that originate both ex-barge and ex-rail grain, and receiving the same terminal and transit service at and east of Chicago available to all ex-rail, ex-lake and ex-barge grain under the tariffs of the Eastern Railroads) said prescribed higher charge will be made for transporting the same from Chicago to Eastern Destinations if such grain arrived in Chicago by barge, but only the lower established reshipping charge will be made if it arrived in Chicago from the same origin by rail.

(b) On grain of any kind coming by rail or lake from any origin, the same established reshipping charge will be made for transporting the same from Chicago to Eastern Destinations, regardless of whether it is ex-lake from Duluth, or ex-rail from within a few miles of Chicago, and regardless of any other factual disparity between such ex-rail and ex-lake grain.

(c) All ex-rail grain, wherever it comes from, and however short the inbound haul, will be transported to Eastern Destinations for three cents less than any ex-barge grain whatever.[20]

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[19] To destinations in Central Territory the changes in ex-barge rates shown in said tariffs vary in amount. They need not be stated in detail since the difference between the change in the rate basis to Central Territory and the change to Eastern Territory is one of degree only.

[20] Similar disadvantages in varying amounts, is imposed on ex-barge grain to destinations in Central Territory.

(18) The increase so prescribed in the reshipping charges on ex-barge grain relative to the reshipping charges east from Chicago on ex-rail and ex-lake grain would substantially lessen the barge-rail traffic via Chicago, and substantially decrease the volume of grain moving by barge to Chicago. The pertinent facts are as follows:

(a) Shippers of grain to Chicago from origins served by both rail and barge transportation to Chicago will have less incentive to ship grain to Chicago by barge, because when it comes to Chicago by barge, the reshipment cost east from Chicago to the same destination will be more than if it came to Chicago by rail.

(b) The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic.[21] One such cost deducted from the Chicago market price in order to arrive at the farmer's net price, is the cost of trucking the grain to the river. The Commission finds: "Where the deductions [from the Chicago price] are less on the barge than on the rail traffic, the net price to the farmer is correspondingly greater, the difference diminishing as distance from the waterway increases until it disappears altogether." (262 I.C.C. 7, *23*) The diminishing difference is due to the increase in the cost of getting the grain to the river as distance from the river increases.[22]

[21] The ... sion correctly so finds. 262 I.C.C. 7, *22-23*.

[22] The Commis... port (262 I.C.C. 7, *39-40*, Tables IV and V in Appendix ... the rates via rail and via barge

It finds further: "The primary interest of the Illinois farmer having access to the Waterway is in the greater net price above referred to. The barge lines and the Waterway elevator operators and dealers are primarily concerned with the vol-

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from some barge origins to Chicago, from which may be computed the differences in such inbound rates as follows:

Origin	Inbound Rates		Difference
	Via rail	Via barge	
ILLINOIS:			
Morris	9.5	2.0	7.5
Seneca	9.5	2.25	7.25
Ottawa	10.0	2.5	7.5
LaSalle	12.0	2.75	9.25
Henry	12.0	3.5	8.5
Lacon	12.0	3.5	8.5
Chillicothe	12.0	3.5	8.5
Peoria	12.0	4.0	8.0
Havana	12.0	4.25	7.75
Naples	13.0	5.0	8.0
MISSOURI:			
Kansas City	16.0	9.5	6.5

Such rate differences, however, do not measure the commercial saving from barge transportation as against rail transportation.

As to rail-arrived grain the Commission finds:

"The net price to the farmer on grain shipped to the Chicago market [by rail] is usually determined by deducting the in-bound truck cost, rail rate, and the country elevator margin from the Chicago price." (262 I.C.C. 7, *16*)

"So far as the rail carriers are concerned the grain originates at numerous so-called country grain elevators located throughout the origin territory requiring an inbound truck haul from the farms ranging from only a few yards to about 10 miles, with a truck charge or cost ranging from 0.9 to 1.8 cents. The all-rail traffic requires only one intermediary between the farmer and the dealer at the primary market or gateway, namely, the country

ume of traffic moving through their facilities."[23] The farmers are also interested in their cooperative elevator facilities on the rivers, which will be depreciated by decreased volume of barge traffic. (c) The Chicago grain dealer must absorb, or pass on to his eastern customer, the cost of transporting the grain east from Chicago; such transportation cost will be higher by 3 cents a hundred pounds to

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elevator operator, whose average margin is about 4.4 cents." (I.C.C. 7, *16*)

As to barge arrived grain, the Commission finds:

"The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic." (262 I.C.C. 7, *23*)

The trucking cost on the great preponderance of barge-grain traffic to the river ranges from 0.9 cents to 5.4 cents depending upon trucking distance. (262 I.C.C. 7, *42*)

"A trimming expense of 0.7 cent per 100 pounds is incurred in connection with the barge-rail grain. • • • The margin for these elevators at the Illinois barge origins averages about 2.68 cents. • • • Although the barge-grain from the Illinois origins does not move through the country rail elevators, it is generally purchased through the operators thereof, who are allowed the same margin as on the rail grain, namely, 4.4 cents." (262 I.C.C. 7, *22-23*)

"The elevator charges and dealer's margin at Chicago are the same as on transit rail grain, namely, 1.6 and 2.25 cents, respectively." (262 I.C.C. 7, *23*)

These items make the commercial saving resulting from the use of barge transportation rather than rail transportation less than the difference between inbound barge and rail rates which are stated above in this note.

"Where the deductions are less on the barge than on the rail traffic, the net price to the farmer is correspondingly greater, the difference diminishing as distance from the Waterway increases until finally it disappears altogether." (262 I.C.C. 7, *23*)

[23] 262 I.C.C. 7, *24*.

all Eastern Destinations when the grain is transported east by rail; aside from abnormalities arising from wartime conditions, which have occasionally created the sellers' market referred to by the Commission, under the Commission's prescribed penalty rate thereon ex-barge grain in the hands of a dealer on the Chicago market will be worth 3 cents less for reshipment by rail to Eastern Destinations than ex-rail or ex-lake grain.

(d) The Commission found, as to discount in prices paid for barge-arrived grain on the Chicago market resulting from the reshipping rates thereon prescribed by it, that there is "no reason" why such discount should be as great as the rate increases resulting from such prescribed rates. Assuming that finding of the Commission were supported by the record, viz., that such discount of ex-barge grain were 2½ cents, or 2 cents, it affords no rational basis for the imposition of said 3 cent rate penalty on all ex-barge grain from Chicago to Eastern Destinations. Insofar as said finding of the Commission refers to grain for reshipment under normal conditions by rail to destinations east of Chicago there is compelling reason (as is also disclosed by the findings in the reports of the Commission that price parity on ex-rail, ex-barge and ex-lake grain is due to reshipping rate parity[23a]) why such discount on ex-barge grain should at least closely approximate said prescribed increases in the reshipping rates thereon, and no substantial reason to doubt that result. Ex-barge grain will be discounted on the Chicago market, as a result of said penalty rates on ex-barge grain.

(e) Succinctly restated, the discount in the Chicago price on ex-barge grain resulting from the incresed rail charge for moving it east, will decrease the net price to the farmer who brings his grain to the river, which shrinks the farm area adjacent to the river deriving any benefit from the low barge rates to Chicago, diminishes the advantage in the narrowed area still deriving any advantage from the

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[23a] 262 I.C.C. 7, 17, 18, 21.

low barge rates, and correspondingly shrinks the barge tonnage into Chicago.

(f) Some grain can and does find escape from Chicago to the east over the Great Lakes.[24] The lake escape for grain from Chicago is not available at all during about five months of every year, when lake navigation is closed by weather and ice conditions on the lakes, and especially the freezing of the Straits of Mackinac through which grain via lake from Chicago must pass. There are annually peak movements of grain to Chicago from origins served by barge at times of year when lake navigation is closed. A large part of the grain moving east from Chicago by rail is for transit intermediate to Buffalo, N. Y. at points that cannot get such service by lake.[25]

(g) When grain inbound by barge is not merchandized at Chicago, but is shipped via barge-rail routes through Chicago for the account of a processor to the east thereof (as for example, wheat from Kansas City to the Montana Flour Mills at Cleveland, Ohio), there is an initial saving in the inbound rates by barge of 6.5 cents (16 less 9.5), which same difference would be reflected at ultimate Eastern Destination if ex-barge grain is continued on a reshipping rate level parity with ex-rail grain from Kansas City. Presently, that saving is narrowed by an additional expense of 3.25 cents at Chicago for trimming, weighing, elevation and inspection of the barge-arrived grain (262 I.C.C. 7, 23, *24*) similar items not being encountered in connection with direct shipments of all-rail grain. Additionally, if the barge shipments from Kansas City came from an elevator thereat, other than the one elevator located on the river bank, additional switching charges and a transfer charge from car to barge must be paid. (262 I.C.C. 7, 23, *24*) These latter charges are the equivalent of 2.64 cents per hundred pounds on a 100,000 pound car. When a 3-cent

[24] See finding number 8.

[25] See finding number 12.

penalty is imposed in connection with the ex-barge reshipping rate, the sum of that penalty plus 3.25 plus 2.64 equal 8.89 cents, which exceeds by 2.39 cents the inbound rate saving from the use of barge service, so as to make the use of barge-rail service commercially impossible under the ex-barge reshipping basis prescribed by the Commission.

(19) The volume of barge grain traffic to Chicago will be substantially curtailed by the said penalty rate basis prescribed on ex-barge grain. Hitherto, the Commission finds: "The proportionals from Chicago on the ex-barge grain being substantially [sic] the same as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billing and to utilize such grain in their hedging operations." (262 I.C.C. 7, *23*) "Backed by barge billing" refers to the fact that in order to secure the application of the outbound rail proportionals, inbound billing for a like amount and kind of grain must be surrendered to the Inspection Bureau at Chicago. The "proportionals" (reshipping charges) from Chicago on the ex-barge grain are not substantially the same, but exactly the same, as on ex-rail and ex-lake grain, to all Eastern Destinations. The Commission finds: "Under the proportionals approved herein on the ex-barge traffic it may be necessary to accord grain backed by barge billing some discount under the Chicago price, * * *" (262 I.C.C. 7, *29*) (going on "but certainly there is no reason why such discount should be as great as the increases resulting from such proportionals," as to which see finding 18(d) herein.)

(20) The said proposal of the Eastern Railroads to increase the reshipping charges on ex-barge grain from Chicago east (relative to such charges on ex-rail grain)

was made with the avowed purpose of driving inbound barge grain traffic, on the barge-rail route via Chicago, off the water and onto the rails;[25a] the Commission now correctly finds that it would have that effect.[25b] By said order the Commission prescribes an increase in the reshipping charges on ex-barge grain from Chicago east (relative to such charges on ex-rail grain) which differs only in degree from the said proposal of the Eastern Railroads, and would divert barge-rail traffic from the lines of plaintiff barge lines to the competing lines of the Western Railroads that bring grain to Chicago from the same western origins.

(21) The inbound barge rates on grain to Chicago represent an adjustment predicated on the volume of such inbound barge traffic. Decrease of such inbound barge traffic volume would require an increase in the barge rates. The volume of such barge traffic varies inversely with the barge rates. A change of a quarter of a cent in the barge rates affects the volume of such barge traffic. Decrease of the volume of such barge traffic does not proportionately decrease the costs of the barge movement of such traffic by the barge lines.

(22) The Commission finds:

> The present combinations on the barge-rail traffic, being so much lower than the all-rail rates from the same and other origins, have diverted and will continue to divert a substantial portion of the traffic to barge-rail routes via Chicago from the all-rail routes, including those through Indianapolis and other markets. This is due, in part, to the level of the barge rates. However, it is also partly due to the level of the present ex-barge proportionals.[26]

[25a] See finding 26 post, footnote 32.

[25b] 262 I.C.C. 7, 25.

[26] 262 I.C.C. 7, 29.

The fact that the barge-rail combinations from any origin via Chicago to Eastern Destinations are lower than the all-rail charges and combinations on such traffic, is solely due to the level of the inbound barge rates to Chicago; for the amount of outbound rail reshipping charges to all Eastern Destinations is precisely the same on the all-rail and barge-rail traffic. To the less-important Central Territory destinations, the fact that the barge-rail combinations via Chicago are lower than the all-rail rates, is also due to the level of the inbound barge rates; to all Central Territory destinations the amount of the outbound rail charges is precisely the same on all-rail and barge-rail traffic on grain originating in Trans-Mississippi and Northwest territory, and on the whole as high (and usually higher) on the barge-rail traffic on grain originating in Illinois. The statement that the condition above described by the Commission "is partly due to the level of the present ex-barge proportionals," is supported by the record in the sense that the advantage of lower inbound barge rates on barge grain is not extinguished by higher outbound rail charges on that grain, under the equal reshipping charges on ex-barge, ex-rail, and ex-lake grain hitherto in effect. But it affords no rational support for the Commission's order.

(23) The inbound barge rates to Chicago are reasonable, and compensatory to the barge lines.[27] The difference between the barge-rail and all-rail combination rates via Chicago to Eastern Destinations, reflects and preserves the inherent low-cost advantage of water transportation on the barge-rail routes. This is equitable.

[27] The Commission correctly so found. (262 I.C.C. 7, *19*): "The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding, may be accepted as reasonable."

(24) The Commission does not find how the inherent low-cost advantage of barge transportation to Chicago would be preserved under its order prescribing said penalty charge on rail transportation of ex-barge grain out of Chicago. Assuming, as the Commission states, that "*If* the rates on the ex-barge traffic are adjusted 'in view of its particular circumstances and under the provisions of the Act designed with reference thereto,' the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traffic, thus preserving the inherent advantage of barge transportation to the adjacent farm community and all others concerned, without any adverse effect on the wartime stabilization program or the effective use of the waterway" (262 I.C.C., *29*) that general hypothetical statement does not constitute a finding of fact that any particular rates (such as those prescribed by the Commission's said order) either will have the effects stated, or are in compliance with the requirements of the Interstate Commerce Act, as amended. Furthermore, so regarded, said statement would conflict with specific facts found by the Commission, a conflict not resolved by any finding of the Commission. (Moreover, if so regarded said statement would lack substantial support in the record.)

(25) The Commission found:

> To trunk-line and New England territories, the ex-barge proportionals are the same as the uniform ex-rail proportionals or specifics. To central territory, the ex-barge rates from the Illinois origins are the same as the northwest proportionals, and from Kansas City the same as the trans-Mississippi proportionals. The barge-rail combinations are not made subject to the above-quoted fourth-section rule and from Illinois are generally far below the local rates from Chicago and also lower than the

local rates from numerous intermediate origins in central territory, constituting numerous and extreme departures from the long-and-short haul provision of section 4 of the Interstate Commerce Act. For example, from Morris, they are lower than the local rates on domestic grain to trunk-line and New England territories from all central territory origins west of a line running south from Amadore, Mich., through Oxford, Mich., just west of Hudson, Mich., then east of the Ohio-Indiana State line south to a point just west of Cincinnati, Ohio. They are also lower than the local rates on export grain from all central territory origins west of a line from Erie, Pa., south through Meadville, thence via Johnsonburg, to Altoona, Pa. The barge-rail rates are far below the all-rail rates from the same and other Illinois origins. This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins, and it is difficult to see, with such extreme disparities, how such requests could properly be denied. As shown by appendix B, table I, there is a substantial production of corn in central territory. While the farmers therein did not appear at the hearing to show that they were hurt by this situation, such evidence was adduced by others in the same relative position, namely, the associations of private and farmer cooperative elevator companies at numerous rail origins in Illinois. This is what is meant by the statement in the prior report that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure.[28]

The bare arithmetical rate computations above stated by the Commission are assumed to be correct; it is also true that:

(a) As to grain produced at intermediate locations between Chicago and destinations to the east, the farm producers, marketers and shippers of such grain and products thereof (who are herein collectively called "in-

[28] 262 I.C.C. 7, 20.

termediate shippers"), insofar as they may compete with grain or products thereof moving through Chicago in supplying demands to the east of them, are unaffected in that competition by the transportation or other costs of moving grain to Chicago. The commercial effect of differences in cost, including transportation cost, of getting grain to Chicago, is exhausted when the grain arrives at Chicago, where it takes the Chicago market price. The price with which any intermediate shippers are in such competition is the delivered price at eastern destination—viz., the Chicago market price plus the reshipping rate east from Chicago. Under the Commission's order, barge-rail grain would be subjected to a higher reshipping rate east from Chicago, and would be correspondingly discounted on the Chicago market to put its delivered price at the eastern destination on a competitive parity with all-rail and lake-rail grain (if, after the ex-barge rates prescribed by the Commission became effective, there were any barge-rail grain on the Chicago market at all). The Commission's order would not affect the Chicago market price, nor the reshipping rate east from Chicago, on all-rail and lake-rail grain. The competitive situation of any intermediate shipper as to grain moving via Chicago would not be affected by the Commission's order.

(b) Low-cost water transportation by barge to Chicago, enabling producers of grain west of Chicago to realize a higher price on their grain when it moves by barge to Chicago, gives marketers at Chicago an economic advantage in the accumulation of grain produced west of Chicago over marketers at locations[29] who deal in grain moving all-rail from origins west of Chicago

[29] Including intermediate locations, such as Indianapolis.

to Eastern Destinations; which economic advantage is due to the fact that there is low-cost water transportation by barge to Chicago and is a natural economic advantage from geographic location, which cannot be conferred on marketers or dealers or elevator operators (wherever located) who are dependent on all-rail routes. This natural economic advantage can, however, be wholly or partly destroyed; as, by increasing the cost of outbound rail transportation east from Chicago on grain that has enjoyed the low barge rates into Chicago, thereby decreasing the price advantage realized by the farm producer west of Chicago from the use of barge transportation to Chicago, and enabling marketers dependent on all-rail transportation to accumulate more grain produced west of Chicago for all-rail transportation, to the disadvantage of the producers and the barge lines.

(c) Grain marketers, dealers and elevator operators (interested in accumulating grain) who are dependent on all-rail routes are not in the same relative position as farmers (interested in selling grain) who are dependent on all-rail routes. The fact that some farmers are so located as to have accessible low cost barge transportation and receive, for that reason, a higher price for their grain, does not decrease the price received by farm producers not so located, and dependent on all-rail transporation. Grain marketers, dealers and elevator operators so situated as to have accessible low cost barge-rail transportation have an economic advantage in that they are able to pay a higher price per bushel, and thus accumulate more grain, than those marketers, dealers and elevator operators who are dependent on higher cost all-rail transportation. That advantage of grain

marketers, dealers and elevator operators so situated as to have accessible low cost barge-rail transportation is a natural economic advantage, which cannot be equalized with, or conferred on, others not so situated; but which can be destroyed, as, by increasing the outbound rail charges on grain that has enjoyed low inbound barge rates.

(d) The Commission's finding that the situation is inequitable, as between all-rail shippers, including "intermediate shippers," on the one hand, and barge-rail shippers on the other hand, is unsupported by the record. It is equitable that the low-cost advantage of water transportation on this barge-rail route should be preserved, and reflected at every destination on the barge-rail route. It is not preserved by increasing the transportation charges on the outbound rail leg of the barge-rail route because the inbound barge rates are low.

(e) All that is said by the Commission in its finding quoted in the first paragraph of this Finding of Fact relates to rate equities as between shippers and does not relate to rate equities as between connecting lines. That finding provides no rational support for the Commission's order as directed to the issue under Section 3(4) of the Interstate Commerce Act.

(f) The present equality of reshipping rates from Chicago on ex-barge, ex-rail and ex-lake grain to Eastern Destinations has been part of the grain rate structure for more than a decade.

(g) About $60,000,000 of public funds have been expended by the State of Illinois and the Federal Government in the improvement of the Illinois Waterway,

which is the water link connecting Chicago with the inland river system of the continent.[29a]

(h) The above quoted comparison made by the Commission of a combination of water rates and rail reshipping rates, with local rail rates, is a comparison of unlike entities.[30] At no point on the barge-rail route is there a lower barge-rail combination rate for a shorter than for a longer haul.

(i) The Commission's finding that said situation involves departures from Section 4 of the Interstate Commerce Act does not support its order, in view of the Commission's conclusion that neither the so-called fourth section rule in the tariffs of the eastern railroads, nor the long-and-short haul clause of Section 4 of the Interstate Commerce Act does, or should, govern

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[29a] "*History of the Illinois Waterways.*—During the period from 1848 to 1908, what was then called the Illinois & Michigan Canal was open to the transportation of grain and other commodities into Chicago. In 1908 the State of Illinois authorized a $20,000,000 bond issue for the improvement of the Illinois Waterways, including a portion of the Illinois River. In 1930 the Federal Government took over the project, and the Waterways were again opened for navigation into Chicago in 1933. Exclusive of the expenditures on the old Illinois & Michigan Canal, it is estimated that the total cost of improvements of the Illinois Waterways for navigation purposes has been $60,000,000. No lock charges are made on the Illinois Waterways. Upon the reopening of these waterways certain individuals, grain merchants, and elevator companies invested large sums in elevator facilities along its course." (246 I.C.C. 353, 354-55)

[30] The local rail rate from Fort Wayne, Indiana, to New York is 30 cents. The transit balance of the reshipping rail rate from Fort Wayne to New York (the difference between the reshipping rates from Chicago to New York and to Fort Wayne) is 11½ cents. Fort Wayne has no water rates, and no reshipping rates.

this barge-rail adjustment, the Commission's finding in respect to this being quoted in the margin:[31]

(26) The proposal to charge a higher rate on ex-barge than on ex-rail or ex-lake grain did not originate with the Commission or with shippers. It was originated by the railroads, for the purpose of driving the inbound traffic to Chicago off the water and onto the rails.[32] It did not include a proposal to increase the ex-lake rates because it was felt that the application to ex-lake grain of the existing reshipping or proportional rates at Chi-

[31] "Under section 6(b)[3] of the Transportation Act of 1940, respondents are not required to increase their present ex-barge proportionals to bring the barge-rail combinations in harmony with fourth-section principles. But this section cannot be construed as precluding respondents from increasing those proportionals to bring the barge-rail combinations more nearly into conformity with section 4. Since section 6(b) of the Transportation Act of 1940 protects the departures in the present adjustment, it follows that it will protect any departures of lesser extent, such as those resulting from the rates approved herein." (262 I.C.C. 7, *30-31*)

[3] This section appears on page 24 of our compilation of the Interstate Commerce Act and related sections of other acts, revised to April 1, 1941, and at 54 Stat. L. 904. The provision of that section referred to reads as follows:

"(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section."

[32] The Eastern Railroads offered only one witness at the hearings who testified at page 90 of the transcript of the testimony taken by the Commission: "We made this proposal, as I have stated several times, and filed these tariffs with the hope that we could drive the business off the water and back on the rails where it belongs." (248 I.C.C. 307, 321)

cago did not take any business away from the Western Railroads.[33] The witness for the Eastern Railroads made no claim at any time that any greater service was rendered or any greater cost incurred in the handling of ex-barge grain at or beyond Chicago than in the handling of ex-rail and ex-lake grain at or beyond Chicago so as to explain, excuse or justify a higher reshipping rate level on ex-barge than on ex-rail and ex-lake grain.

(27) Findings on which the Commission purported to base its conclusion that higher rates on ex-barge grain than on ex-rail and ex-lake grain would not be discriminatory as between connecting carriers read as follows (262 I.C.C. 7, 27-28):

> "Where, as here, ex-rail and ex-lake proportionals or specifics reflect average circumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.
>
> "The principal differences as shown by this record and described above may be summarized as follows:
>
> 1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory and less line-haul service to the southern portion of central territory.
>
> 2. The in-bound rail hauls of all the traffic which engages the ex-rail proportionals are substantially longer, on the average, than the in-bound barge hauls.

[33] Testimony of witness Tannehill for the Eastern Railroads at Page 3660 of the transcript of the testimony taken by the Commission.

3. The rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic here considered, include:

(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of the gateways an average out-bound factor which is a component part of many through rates of different amounts, which vary with the length of the in-bound hauls and the western factors applicable thereto.

(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the in-bound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways.

(c) The ex-rail proportionals or specifics, combined with the in-bound interstate rates or specifics, result in through all-rail rates to official territory which harmonize with each other and with the local rates in that territory.

4. Lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul in-bound and is usually preceded by an in-bound rail haul. The rail-lake-rail combinations, in general, conform to the principles which underlie section 4. In these respects, lake grain is like barge grain from Kansas City but unlike barge grain from Illinois. To trunk-line and New England territories, the lake-rail grain differs from all of the barge-rail grain moving through Chicago in that the lake-rail grain can and generally does by pass that gateway entirely."

We find:

The findings of the Commission do not disclose any rational relation between such differences, if any, and the

difference in reshipping rate prescribed on ex-barge grain as compared with the established reshipping charges, that remain applicable on ex-rail and ex-lake grain and that have hitherto been applicable on ex-barge grain. Nor does the record before the Commission disclose any such relation.

(28) As to the Commission's said finding that "on the average" there were differences as found by the Commission in paragraph "1" above quoted, between ex-barge and ex-rail grain,[34] we find that:

[34] The Commission elsewhere finds: "The western factors of the through rail rates include not to exceed three transit services without additional charge, and to the extent that the all-rail shipments receive transit on the in-bound movements to the gateways there is less demand on the eastern carriers to perform transit service thereon. This record shows that there is a very substantial volume of domestic grain and grain products moving from points west of the gateways to the East without transit at *the gateways* or points east thereof. That such through movements by rail are substantial is shown by the statistics set forth in appendix B hereto coupled with the fact that official territory consumes as grain or products about 156,000,000 more bushels annually than it produces. Moreover, all-rail grain may be, and frequently is, marketed and processed at Chicago under one transit operation, which avoids the necessity for processing at an intermediate point east thereof. Transit is not available under the in-bound barge rates. Barge-rail grain is marketed but not processed at Chicago. To be processed before final destination it must be transited at some point beyond Chicago. It follows that respondents are called upon to perform more transit service, on the average, on the ex-barge than on the ex-rail traffic." (262 I.C.C. 7, *22*)

Grain processed in transit at Chicago, or west of Chicago, comes to the hands of the Eastern Railroads as grain products, and takes a different rate than the reshipping rate on whole grain. "From the gateways to trunk-line and New England territories, grain products take 0.5 cent over grain, . . ." (262 I.C.C. 7, *14*)

The Eastern Railroads bear no costs of elevation.

(a) Such differences also exist between ex-rail and ex-lake grain.[35] Under the Commission's order the same reshipping rate east from Chicago would prevail on ex-rail and ex-lake grain and a higher reshipping rate on ex-barge grain only. Ex-barge and ex-lake grain via Chicago are in competition to supply eastern demands.

(b) The application by the Eastern Railroads of the present reshipping charges on ex-rail (or ex-lake) grain is not, and, under the Commission's order would not be, contingent upon the amount of terminal or transit service such ex-rail (or ex-lake) grain does or does not receive. Under the tariffs and the order, that portion of the ex-rail (and ex-lake) grain traffic which receives the identical transit and terminal services at Chicago and at transit points east thereof as is received by ex-barge grain will move on the present and lower reshipping rate level.

(c) Assuming the record showed any substantial difference, or any difference whatever, in the costs and services of the Eastern Railroads in handling (a) grain products or grain moving in continuous service through Chicago, on the one hand, and (b) whole grain receiving a transit service and transfer of lading at Chicago, on the other hand, the "averaging" of all ex-rail grain falling in both categories for the purposes of the report and order is the equivalent of according grain falling in the first category a higher reshipping rate level, costs and services considered, and ex-rail grain in the second category a lower reshipping rate level, costs and services considered, than is to be continued with the approval of the Commission on all ex-rail grain; and is the equivalent of according ex-rail grain in

[35] The Commission finds: "Unlike the all-rail traffic, the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading, and requires a full origin and terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation." (262 I.C.C. 7, *18-19*)

the second category a lower reshipping rate level than would be required thereon by the rate-making principle followed by the Commission in prescribing a reshipping rate level on ex-barge grain.[36] The ex-rail grain in the second category (grain receiving a transit service in connection with temporary storage at Chicago) far exceeds in volume the total volume of ex-barge grain. The so-called "averaging" of all ex-rail grain falling in both categories bears no rational relation to the uniform 3-cent penalty prescribed in the reshipping rate level on ex-barge grain from Chicago to Eastern Destinations.

(d) Ex-rail and ex-barge grain moving through Chicago receives exactly the same line-haul service to the southern part of Central Territory. If it were otherwise, such difference of rail service from Chicago to the southern part of *Central Territory* would have no rational relation to the 3-cent reshipping rate penalty prescribed on ex-barge grain from Chicago *to Eastern Destinations.*

(e) Under the tariffs and the order, the portion of the all-rail grain traffic which moves via Chicago and over the same circuitous routes to the southern portion of Central Territory as ex-barge grain will move on the present reshipping rate level lower than is prescribed for ex-barge grain.

(f) There is no finding which specifies the extent of the differences found to exist, in general terms in paragraphs 1 and 2 above quoted and there is no evidence tending to show the extent of such differences, if any.

(g) The Eastern Railroads obtain the same charges and revenues on ex-rail, ex-lake, and ex-barge grain.

(h) There is no finding (and no evidence) that the Eastern Railroads sustain any substantial

[36] The tremendous volume of grain shipped outbound from Chicago to the east, only a small portion of which can be ex-barge grain since barge-arrived grain constitutes a small fraction of all inbound grain received at Chicago, is shown in Finding No. 8.

differences of cost in their service east from Chicago on ex-rail, ex-lake, and ex-barge grain moving to the same destinations.[37]

In its report of December 1, 1941, the Commission found (248 I.C.C. 307, 311) "* * * in each instance [ex-barge, ex-rail, and ex-lake reshipments] the physical carriage beyond the reshipping point is substantially the same." In its report of February 13, 1945, the Commission found (262 I.C.C. 7, 8 emphasis supplied) "Ex-barge, ex-lake and also ex-rail traffic *except as hereinafter indicated*, are all accorded *the same outbound service*, * * *." The matters "hereinafter indicated" are described in the finding of the Commission first quoted in Finding of Fact number 27 and do not constitute substantial differences in outbound service in respect to ex-barge grain, on the one hand, as compared with ex-lake grain, on the other, or as compared with ex-rail grain from the same origin which receives, as is provided by the tariffs, at and east of Chicago the same transit and terminal services and the same line-haul service as is received by ex-barge grain.

(i) Assuming that substantial quantities of ex-rail grain are processed in transit west of and at Chicago and move east of Chicago as grain products without receiving additional transit services, whereas, all ex-barge grain is processed in transit at points east of Chicago, so that the latter grain receives on the average more transit services east of Chicago when moving on the rates in issue than does the average of all all-rail grain and grain products, it further appears that any transit service received for processing purposes east of Chicago pays a 0.5-cent charge therefor in addition to the reship-

[37] The subject is mentioned, however, in the dissenting opinion of Commissioners Alldredge and Lee: "The eastern railroads have not shown a need for additional revenue or established the existence of any higher costs of consequence, terminal or otherwise, in the transportation of ex-river traffic than those incurred in the handling of ex-rail or ex-lake traffic of the same character." (262 I.C.C. 7, 35)

ping rate.[37a] By reason of this fact, the difference in the average transit service east of Chicago on ex-barge as compared with ex-rail grain is not a difference in circumstances related to the reshipping rates for line-haul service in issue in this cause.

(j) Furthermore, if it were otherwise, and if it be a fact that a substantial volume of grain or grain products moves via all-rail routes from points west of "the gateways" to the East without transit at "the gateways" or points east thereof, the evidence referred to by the Commission in its finding quoted in footnote No. 34 above does not show how much (if any) thereof moves via Chicago, or any rational relation with the penalty imposed on the reshipping rate on ex-barge grain from Chicago to the East.

(29) With respect to the finding of the Commission in said paragraph "2" above quoted that the inbound rail hauls of all of the traffic which engages the ex-rail proportionals are substantially longer "on the average," than the inbound barge hauls, we further find:

(a) Under the Commission's order ex-barge grain and ex-rail grain of like kind coming from an identical origin west of Chicago will always take different reshipping rates from Chicago depending on whether the inbound haul was by barge or rail, the higher rail reshipping charge being assessed on ex-barge grain from such identical origin to all Eastern Territory (and most Central territory) destinations.[38]

[37a] Witness Scott, in describing the total transportation charges on grain from Kansas City to New York City moving via barge to Chicago, thence via rail to Cleveland or Fostoria, Ohio, for processing under transit, and thence as grain products to New York City, stated that such aggregate included 0.5-cents for tranfer (transit) at the Ohio processing point. (pp.3549-3550 of transcript of hearings before the Commission)

[38] Here, and before the Commission, the plaintiffs complain of this (among other things) as discrimination between connecting lines.

(b) The barge lines and the Western Railroads are in competition for the inbound haul only from origins accessible to inland river transportation. The inbound "rail" hauls of "all of the traffic" engaging the reshipping rates include inbound rail hauls from origins not accessible to barge transportation, whose length, when included in such average, renders it irrelevant to and without rational bearing upon said competitive traffic between the barge lines and the Western Railroads, and without rational bearing upon the non-discriminatory relation that should prevail under the Interstate Commerce Act, as amended by the Transportation Act of 1940, with respect to the rail reshipping rates and charges east from Chicago on the traffic of the barge lines and the Western Railroads from identical, water-competitive origins.

(c) The reshipping charges, referred to in said finding of the Commission as "the ex-rail proportionals" are, and for many years have been, also the ex-barge reshipping rates or proportionals.

(d) "To Trunk-line and New England territories the proportionals from Chicago and the other gateways are uniform, regardless of origin"[39] (262 I.C.C. 7, 12) and would so continue as to ex-rail and ex-lake grain under the Commission's order.

(30) The alleged difference in rate-making circumstances found in paragraph "3(a)" above quoted is not truly such, since the ex-barge rates likewise are a component of the many through rates of different amounts, which through rates vary with the lengths of the inbound hauls and the western factors applicable thereto, whether said ex-barge rates are made the same or higher than the ex-rail and ex-lake rates.

(31) As to the difference found by the Commission

[39] Reshipping charges on grain east out of Chicago to Eastern Distinations have been uniform irrespective of origin since February 1, 1910. (262 I.C.C. 7, *12, 14*)

to exist between all-rail and barge-rail transportation in paragraph numbered "3(h)(2)" above quoted,[40] that the "ex-rail" reshipping charges from Chicago to all destinations to the east thereof "are" adjusted to equalize the "all-rail" rates by the various routes and gateways,[41] the Commission's further finding is:

> "Peoria and St. Louis would, of course, be entitled, on reasonable request, to ex-barge proportionals, properly aligned with those approved herein from Chicago, but the record does not contain sufficient detail for the prescription of such proportionals in this proceeding." (262 I.C.C. 7, *32*)

There is no finding (nor evidence) that ex-barge proportionals cannot be prescribed, or voluntarily established by the carriers, via other routes and gateways, equalizing the barge-rail rates via such other routes and gateways, in alignment with the present reshipping charges on ex-barge grain from Chicago. That the process of equalization of the various routes and gateways had reached maturity as to all-rail rates, and remains to be completed as to barge-rail rates, constitutes no intrinsic difference between all-rail and barge-rail transportation as such; it is not rationally related to the Commission's conclusion that the process of alignment

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[40] As to paragraph "3(b)(1)" above quoted see findings numbered 25(e), (g) and (h) herein above made.

[41] Combination through rate factors on grain from Trans-Mississippi and Northwest territories to and from St. Louis and Peoria produce the same total through rates as to and from Chicago. This result is produced by an adjustment of inbound and outbound rates by rail which vary inversely. Such result is termed "gateway equalization." However, from the Illinois origins from whence moves the preponderance of the barge grain, the only gateway used in constructing combination through rates to the east is Chicago, and no other gateway-market is "equalized" therewith under the all-rail adjustment.

of the ex-barge rates via other routes and gateways should go forward, as the Commission proposes, on the basis of a penalty rate from Chicago on ex-barge grain as against ex-rail grain, thus extending the penalty basis prescribed to barge traffic via other routes and gateways.

(32) As to the alleged difference found by the Commission to exist between barge-rail and all-rail grain traffic in paragraph "3(c)", above quoted, there is no finding by the Commission (and no evidence in the record) to show that combination through barge-rail rates based on ex-barge reshipping or proportional rates made the same as the ex-lake and ex-rail reshipping or proportional rates, would fail to harmonize with each other and with the local rates in that territory. Such rates would "harmonize" in every sense that the combinations resulting from the rates prescribed by the Commission harmonize. However, barge-rail rates based on inbound water rate factors sufficiently low to reflect the inherent advantages of low cost water competition are necessarily in "disharmony" with all-rail rates based on inbound rate factors reflecting the higher costs of rail service. Such disharmony must exist unless barge-rail combination through rates are made as high as the all-rail combination through rates. They can be made as high in two ways: By increasing the inbound barge factor to equal the inbound rail factor or by increasing the outbound rail factor on the ex-barge traffic by an amount sufficient to offset the difference between the respective inbound rates by barge and by rail. The practical commercial effect of the Commission's order is the same as if it had required a 3-cent increase in the inbound rates by barge in the face of its finding that said barge rates are reasonable and compensatory.

(33) As to the finding of the Commission in paragraph "4" above quoted, we refer to findings hereinabove made, and further find:

(a) The said finding of the Commission does not recite any difference in transportation circumstances and conditions as between ex-lake grain, on the one hand, and ex-barge grain from Kansas City, but, on the contrary finds that such conditions are similar.

(b) Substantial quantities of wheat come to Chicago ex-barge, from Illinois origins. It is also true that over a period of almost four years more wheat came to Chicago by barge from all origins than by lake. (262 I.C.C. 7, *41*) [42]

(34) The reshipping rate level to be continued on ex-rail and ex-lake grain is not contingent on the length of the inbound haul to Chicago; is not contingent on whether the grain moves in continuous service via Chicago or some other gateway or is temporarily stored in Chicago prior to reshipment; is not contingent on the amount of the terminal or interchange service performed by Eastern Railroads in Chicago or other junction points on the shipment or reshipment of the grain; is not contingent on the amount of transit service received by the grain at intermediate points in connection with either the inbound hauls to Chicago or the outbound hauls therefrom; and is not contingent on the

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[42] *Wheat Received at Chicago* (in thousands of bushels)

Year	By Lake	By Barge
1940	2,636	2,773
1941	1,404	1,695
1942	863	550
1943 (first 10 months)		31
Totals	4,903	5,049

amount or circuity of the line-haul service on the routes to, via, or from Chicago to ultimate destination. Stated differently, said reshipping rate level is held out by the tariffs of Eastern Railroads and applied to all ex-rail and ex-lake grain reshipped at Chicago; this includes grain which moves inbound for both short and long distances; and includes grain which moves through Chicago or other gateway or junction points in continuous service and grain which is temporarily stored at Chicago and there transferred from car, boat, or barge to an elevator and then from elevator to car; and includes grain which received substantial transit services at intermediate points east of Chicago, as well as grain which receives no such transit service; and includes grain which moves over direct routes, as well as grain which moves over circuitous routes.

(35) Other findings in the report and order of the Commission disclose that the relative amount of terminal and transit service at the gateways or junctions, the relative amount of transit service at intermediate points in Official territory, the relative amount of line-haul service performed by the Eastern Railroads and the relative lengths of the inbound hauls do not constitute rate-making considerations observed in the establishment and maintenance of the ex-rail and ex-lake rates. Such findings read as follows:

> "The service under the inbound rail rates to the gateways includes switching to the train at origin, the privilege of intermediate transit stops, not exceeding three, and terminal service at the gateway. The through rates apply whether the traffic moves in continuous through transportation in which case interchange is the only service performed at the junction, or under the governing transit provisions where it is stopped at the gateway or other intermediate point for marketing or

processing. In the latter event, the outbound service generally consists of concentrated movements in large lots of several cars at a time out of terminal elevators." (206 I.C.C. 7, *14*)

"The all-rail adjustment by providing for proportionals or outbound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assist them in maintaining a common price, thus facilitating hedging and other market operations. The all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and circuitous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points." (206 I.C.C. 7, *17*)

"Unlike the all-rail traffic, the lake-rail traffic following the water course moves only over circuitous routes, requires transfer of lading, and requires a full origin terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation. The inbound lake movement consists chiefly of wheat moving for relatively long distances." (206 I.C.C. 7, 17-18)

36. The Commission found: "As to the ex-lake rates from Chicago, that these do not adversely affect those interested in the barge-rail traffic via Chicago is shown by the fact that if such ex-lake rates were increased, lake grain from the Northwest would continue to flow to the Lake Erie and Hudson River ports, and those interested in the barge-rail traffic via Chicago would be no better off than before." (262 I.C.C. 7, *29*) Granting that ex-lake grain, if subjected to the same penalty basis of rail reshipping rates east of Chicago as prescribed by the Commission on ex-barge grain, would be diverted via lake from Chicago to Lake Erie

and Hudson River ports insofar as the same is for the supply of eastern dealers and processors located at eastern destinations (east of Buffalo), the Commission also finds that there is a movement of ex-lake grain from Chicago to dealers and processors in Central Territory (west of Buffalo) for transit there into Eastern Territory under the present parity of reshipping rates;[43] and large areas of Central Territory geographically cannot be served in such transit via lake through Lake Erie and Hudson River ports, but can be and are served with ex-lake grain through Chicago. The only route by which ex-lake grain can be shipped to dealers and processors in Central Territory as aforesaid in competition with ex-barge grain is via Chicago.

(37) The portion of the said order of February 13, 1945, herein complained of which prescribes higher rail reshipping charges on ex-barge than on ex-rail and ex-lake grain east from Chicago, is not supported by the findings of the Commission. The Commission considers matters to warrant said portion of said order that do not warrant it, and that have no rational relation to the conclusion that such ex-barge reshipping rates could lawfully be those, higher than such ex-rail and ex-lake reshipping rates, prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940. The Commission seeks to support said portion of said order by findings that are unsupported by the record.

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[43] 262 I.C.C. 7, *18*. See also footnote 8, *supra*, and testimony of Witness Tannehill for the Eastern Railroads at page 92 of the record before the Commission. Between 1933 and November 1, 1943, there were received at Chicago by lake 45,590,000 bushels of grain; by barge, 102,633,000 bushels; by rail, 1,485,655,000 bushels. (246 I.C.C. on *383*; 272 I.C.C. 1, on *41*) (These figures are confined to corn, wheat, oats and soybeans; other kinds of grain moving in less volume are not included.)

Upon the above and foregoing Findings of Fact, the court states the following:

Conclusions of Law.

I.

The portion of the order of February 13, 1945, of the Interstate Commerce Commission which prescribes higher rail reshipping charges east from Chicago on ex-barge grain than on ex-rail and ex-lake grain, is of a character which this court has jurisdiction to enjoin and set aside, and this Court has jurisdiction over the subject matter of said suits.

II.

Plaintiffs in the above-entitled causes have an interest and standing which entitles them to bring and maintain these suits.

III.

The portion of the said order of February 13, 1945, herein complained of which prescribes higher rail reshipping charges on ex-barge than on ex-rail and ex-lake grain east from Chicago, is not supported by the findings of the Commission.

IV.

Findings made by the Commission in support thereof are not supported by the record in respects stated in the foregoing Findings of Fact.

V.

The Commission considers matters to warrant said portion of said order that do not warrant it, and that have no rational relation to the conclusion that such ex-barge rail reshipping charges could lawfully be higher than such ex-rail and ex-lake rail reshipping charges as prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940.

VI.

The Interstate Commerce Commission is without authority directly or indirectly to adjust any rates for the purpose of equalizing the economic advantage of those who are so located as to enjoy low-cost water transportation with the situation of others who by reason of their different location do not enjoy that economic advantage, notwithstanding the Interstate Commerce Commission's own opinion may be that the existence and enjoyment of such natural economic advantage is an inequitable situation.

VII.

Transportation circumstances and conditions involved in and pertaining to transportation by rail from points not accessible to and served by inbound water transportation to points east of Chicago were not material or relevant to the decision of the questions before the Commission; those circumstances and conditions have no rational bearing on the questions for decision which were in issue before the Commission; and the Commission erred in considering such circumstances and conditions in the averages referred to by it in its finding quoted in Finding of Fact No. 27, above.

VIII.

In adjusting rail rates or charges on traffic moving via the connecting lines of common carriers who are regulated under the Interstate Commerce Act, whether such connecting carriers are water or rail carriers, and as between the traffic of such connecting water carriers on the one hand and the traffic of such connecting rail carriers on the other hand, the Interstate Commerce Commission is bound to observe the requirements of Section 3(4) of Part I of the Interstate Commerce Act as amended by the Transportation Act of 1940, and failed so to do.

IX.

The Commission is without authority to remove any inequity found by it to exist by authorizing a rate discrimination between connecting lines.

X.

Departures from, or violations of, the long-and-short haul provision of Section 4 of the Interstate Commerce Act, or the principles of that Section, cannot lawfully be cured by means which would violate Section 2 or Section 3(4) of said Act.

XI.

The Interstate Commerce Commission, in adjusting rail rates or charges on traffic moving via the connecting lines of common carriers who are regulated under the Interstate Commerce Act, under the requirements of Section 4(1) of the Interstate Commerce Act, as amended by the Transportation Act of 1940 (and particularly Section 6(a)(1) and 6(b) thereof) is not at

liberty to deny or qualify the requirements of Section 3(4) of the Interstate Commerce Act, as amended by the Transportation Act of 1940.

XII.

The National Transportation Policy enacted by the Transportation Act of 1940 is not precatory, but is mandatory.

XIII.

A principal inherent advantage of water transportation is that it is carried on at low cost, and it is the intent of the Interstate Commerce Act as amended in 1940 to include the same among the inherent advantages of all modes of transportation subject to the provisions of the Interstate Commerce Act, and that the Interstate Commerce Commission shall administer all sections of said Act, so as to develop, co-ordinate and preserve a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, which system incorporates and preserves said inherent low-cost advantage of water transportation."

XIV.

The portion of said order of February 13, 1945, which authorizes prescribed higher rail reshipping rates or charges east from Chicago on ex-barge grain than on ex-rail grain is invalid, and should be enjoined as prayed in the complaints.

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[46] 81 Cong. Rec. p. 6127.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

A. L. Mechling, doing business under The trade name and style of A. L. Mechling Barge Line, *Plaintiff*, vs. United States of America, *Defendant*, and Interstate Commerce Commission, *Intervening Defendant*.	Consolidated Case No. 45 C 865 Civil Action File No. 45 C 865
Inland Waterways Corporation, *Plaintiff*, vs. United States of America and Interstate Commerce Commission, *Defendants*.	Civil Action File No. 45 C 866
The Secretary of Agriculture of the United States and the War Food Administrator, *Plaintiffs*, vs. United States of America, *Defendant*, and Interstate Commerce Commission, *Intervening Defendant*.	Civil Action File No. 45 C 1020

ORDER.

These consolidated causes coming on further to be heard upon the motion of the plaintiffs for a decree, and it appearing that:

(a) The court has entered herein certain Findings of Fact and Conclusions of Law;

(b) The Interstate Commerce Commission in the proceeding before it there known as "Investigation and Suspension Docket 4718, Grain Proportionals, Ex-Barge to Official Territory" referred to in said Findings of Fact entered on February 13, 1945, a certain order, a part of which should be enjoined as stated in said Conclusions of Law.

(c) Thereafter on October 4, 1945, this court entered herein its temporary injunction temporarily restraining such portion of said certain order entered on February 13, 1945, whereupon on the same day the Interstate Commerce Commission entered its further order in the same proceeding before it suspending until May 5, 1946, (unless otherwise ordered by the Commission) the operation of certain tariffs filed in conformity with said portion of said order of February 13, 1945, and especially Supplement 133 to Agent B. T. Jones' I.C.C. No. 3356 and Supplement 27 to Agent B. T. Jones' I.C.C. No. 3363.

Now, Therefore, It Is Ordered, Adjudged and Decreed by the court that:

1. Said order of the Interstate Commerce Commission of February 13, 1945, referred to in the pleadings herein, and entered by the Commission in the proceeding before it known as "Investigation and Suspension Docket 4718, Grain Proportionals, Ex-Barge to Official Territory," and the operation and effect of said last mentioned order of the Commission insofar as the same either

(a) Prescribes, approves, authorizes or countenances in any manner whatever a charge for railroad services in transporting east from Chicago grain that has

arrived thereby barge that is higher than any rate or charge that is contemporaneously exacted in any form or under any guise for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain from like origins west of Chicago; or

(b) Prescribes, approves, authorizes or countenances in any manner whatever a rate or charge for transporting ex-barge grain east from Chicago that, on account of alleged differences in conditions and circumstances surrounding the transportation of ex-barge and ex-rail grain, is higher on the ex-barge grain than any rate or charge contemporaneously exacted in any form or under any guise for the rail transportation east from Chicago of like ex-rail grain, or like ex-lake grain, so long as such relative differences also exist between transportation of like ex-rail and ex-lake grain without being reflected in the rail rates or charges for transportation east from Chicago of like ex-rail and ex-lake grain.

be and it is hereby enjoined.

2. And the Interstate Commerce Commission is hereby restrained and enjoined from taking any action or step whose effect, direct or indirect, would be to sanction, establish or permit to become effective any rail rates or charges for the transportation of ex-barge grain from Chicago to points lying to the east thereof that are higher than rail rates or charges that are or may be contemporaneously exacted for that service on like ex-rail or ex-lake grain, that are in any way predicated upon the purported authority of the said void

portion of the order of the Interstate Commerce Commission of February 13, 1945.

3. This cause is hereby remanded to the Interstate Commerce Commission for further proceedings disposing of said proceeding known as "Investigation and Suspension Docket 4718, Grain Proportionals, Ex-Barge to Official Territory," in conformity with the Findings and Conclusions of this court.

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Circuit Judge

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District Judge

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District Judge

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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1946

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

A. L. MECHLING, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture was a plaintiff in the court below and the United States the defendant. Inasmuch as their position was and is the same they are filing a single joint brief in this Court.

OPINIONS BELOW

The specially constituted district court wrote no opinion. Its findings of fact and conclusions

of law (R. 177–207) have not been reported. The report of the Interstate Commerce Commission (R. 10–49) appears at 262 I. C. C. 7.

JURISDICTION

The final decree of the district court was entered on November 26, 1945 (R. 207–209). The petition for appeal was filed and allowed on January 24, 1946 (R. 209–210, 214–215). The jurisdiction of the Court is invoked under Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiences Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on April 29, 1946 (R. 228).

STATUTE INVOLVED

The relevant provisions of Part I of the Interstate Commerce Act are set forth in Appendix I, *infra*, pp. 84–86.

QUESTION PRESENTED

Whether the Interstate Commerce Commission, under the circumstances here involved, may lawfully prescribe and approve a relationship in rates under which Eastern railroads charge higher rates for transportation from Chicago to eastern destinations of grain shipped by water to Chicago from points of origin on the inland waterways system

than the rates charged by the railroads for transportation from Chicago to the same destinations of grain shipped by rail to Chicago from the same points of origin on the inland waterways system.

STATEMENT

For many years grain moving from Chicago by rail to eastern destinations has enjoyed "reshipping or proportional rates,"[1] lower than the corresponding local rates, regardless of the means by which the grain was brought to Chicago from the point of origin further west where the grain began its movement from farm to market.[2] The same

[1] This term designates rates which are applicable only when the transportation to which they relate is part of a through movement. In the absence of a "joint through rate" applicable from origin to ultimate destination, the through rate is derived by "combination" of "factors" for the intermediate distances. When such a factor is lower than the "local" rate applicable between the same points on traffic that has not had a prior movement or will not have a subsequent movement, it is called a "proportional" rate. Where, as here, the proportional rate involved applies not to the first, but to the subsequent stage of a through movement, it may be spoken of as a "reshipping" rate. As to these definitions, see *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 771; *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671, 694; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 539; *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 315.

[2] Grain moved to Chicago by barge during the period from 1886 to 1907 when barge service was discontinued until restored in 1933. Not until 1939 did the railroads propose to eliminate the parity between the rates applicable to grain which had arrived at Chicago by barge and

rates were applied eastbound from Chicago whether the grain came to Chicago by rail, by lake vessel, or by barge.[3]

However, by 1939 the volume of grain traffic moving to Chicago by water had become so substantial[4] that the railroads thought it advisable to take measures to divert this traffic from the water carriers and recapture it for the rails.[5] Accord-

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that which had utilized other means of transportation to that city. *Grain Proportionals, Ex-Barge to Official Territory*, 262 I. C. C. 7, 20, R. 23; *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 312.

[3] The terms "ex-rail," "ex-lake," and "ex-barge" are used to designate grain which has had an antecedent haul to the railheads of the Eastern railroads by rail, lake, or barge, respectively.

[4] Unlike many commodities, grain is peculiarly adapted to barge transportation. The growth in barge traffic, due to the advantage derived by the farmers from the lower rates for water transportation, has been significant. During the years 1935–1938, inclusive, one railroad transported from its most important barge shipping point to Chicago, 480, 802, 572, and 753 carloads of corn, respectively; whereas during the first eleven months of 1939, it transported only 44 carloads. Ex-barge grain received at Chicago in 1939 amounted to 17,076,000 bushels, as compared with 137,000 in 1933. *Grain Proportionals, Ex-Barge to Official Territory*, 246 I. C. C. 353, 361, 364, 383. For 1940, 1941, 1942, and the first 10 months of 1943, the inbound movements by barge amounted to 19,996,000; 17,697,000; 15,894,000 and 10,980,000 bushels, respectively. 262 I. C. C. at 41, R. 48.

[5] As the late Commissioner Eastman pointed out, the testimony offered by the railroads in support of the tariffs filed in 1939 showed that the schedules were proposed "with the hope that we could drive this business off the water and back onto the rails where it belongs." *Grain*

ingly, rate schedules were filed by the Eastern railroads,[6] to become effective October 15, 1939,[7] which would have increased the rates paid for transportation from Chicago to eastern destinations of grain moving to Chicago by barge, while making no change in the rates on ex-rail and ex-lake grain. This result was to have been achieved by restricting the "proportional" or "reshipping" rates so that they would no longer apply to ex-barge grain. Such grain would then have had to bear the much higher "local" rates between Chicago and its eastern destination.

Upon protests being made to the Interstate Commerce Commission by affected parties, the proposed schedules were suspended by the Commission for investigation. Only one witness testified in support of the new rates and he frankly told the Commission that the purpose of the eastern railroads in filing these tariffs was to assist their connecting western rail lines in driving grain traffic away from the boat and barge lines to the western railroads.[8]

Proportionals, Ex-Barge to Official Territory, 248 I. C. C. 307, 321.

[6] Baltimore & Ohio Railroad Company, New York Central Railroad Company, New York, Chicago and St. Louis Railroad Company, Pennsylvania Railroad Company, Erie Railroad Company and the Chesapeake & Ohio Railroad Company.

[7] Due to litigation, the proposed rates have never gone into effect.

[8] R. 195; see 248 I. C. C. at 321. That this was the sole objective of the railroads is also shown by several cir-

On July 31, 1941, Division 2 of the Commission (Commissioner Alldredge dissenting) found that the suspended schedules had not been shown to be unlawful.[9] *Grain Proportionals, Ex-Barge to Official Territory*, 246 I. C. C. 353. Upon reconsideration the Commission (Commissioners Eastman,[10] Alldredge, Porter, and Johnson dissenting) on December 1, 1941, reaffirmed that finding. *Grain Proportionals, Ex-Barge to Official Ter-*

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cumstances. The western railroads actively supported the proposal before the Commission (246 I. C. C. 364–365; 262 I. C. C. 9, 10; R. 13), although they would have received no part of the higher charges which the eastern railroads sought to apply to ex-barge grain. The witness offered by the eastern railroads made no claim that more service was afforded or that greater costs were incurred in the transportation of ex-barge grain than in the transportation of ex-rail grain. Moreover, it is clear that the eastern railroads were not seeking greater revenues, for, if they had been successful in driving the grain traffic from the water carriers to the western railroads, the eastern carriers would have transported the grain for the lower proportional rates applicable to ex-rail traffic instead of transporting the grain for the much higher local rates which they were attempting to make applicable to ex-barge grain.

[9] Division 2 also held that the proportional rates had never been applicable on ex-barge grain, for the reason that the antecedent water transportation was not subject to regulation by the Commission. 246 I. C. C. at 380–81. This principle would likewise have invalidated many ex-lake and other rates and led to a multitude of suits by carriers to collect undercharges; it was disavowed by the full Commission on rehearing. 248 I. C. C. at 309, 311–19.

[10] The late Commissioner Eastman in a vigorous dissenting opinion expressed the view that the proposed schedules violated Sections 2 and 3 of the Interstate Commerce Act, and possibly Section 1 as well. 248 I. C. C. 320–23.

ritory, 248 I. C. C. 307. The Commission's order was set aside in *Cargill, Inc.* v. *United States*, 44 F. Supp. 368 (N. D. Ill.), but upon appeal by the Interstate Commerce Commission the district court's judgment was reversed on June 14, 1943, in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671.

Thereafter the Commission reopened the proceeding. The railroads took no steps to put the proposed schedules into effect. Instead, further hearing was held by the Commission for the purpose, among others, of receiving evidence on the question "of whether or not reshipping or proportional rates should be prescribed for interstate transportation by rail of ex-barge grain, in carloads, from Chicago and other related points of origin embraced in the instant proceeding to eastern destinations considered therein, and if so, to determine what would be reasonable and otherwise lawful proportional or reshipping rates for application on such traffic." (262 I. C. C. 9, R. 12.)

On February 13, 1945, the Commission made the report and order here under review.[11] *Grain Proportionals, Ex-Barge to Official Territory*, 262 I. C. C. 7, R. 10–49. Reversing its previously expressed views that the proposed schedules had not been shown to be unlawful (246 I. C. C. at 381; 248 I. C. C. at 311), the Commission upon

[11] The order of February 13, 1945, incorporates by reference the prior reports of July 31, 1941, and December 1, 1941.

the amplified record decided to order that the proposed schedules be cancelled.[12] No controversy exists on this appeal with respect to this aspect of the Commission's order.

But the Commission went on to prescribe and approve a relationship between proportional rates on ex-barge grain from Chicago to eastern destinations and proportional rates on ex-rail and ex-lake grain moving from Chicago to the same destinations. Under this relationship the proportional rates on ex-barge grain, though less than the local rates for transportation of grain, would be higher than the proportional rates on ex-rail grain originating at the same points on the inland waterways system (262 I. C. C. 32, R. 36; see, also, Appendix A, Table II, 262 I. C. C. 39, R. 43). The eastern railroads promptly published tariffs,[13] naming proportional

[12] 262 I. C. C. at 33, R. 37. The Commission found that "The record as amplified on further hearing shows that the proposed schedules would lessen and possibly destroy the barge-rail traffic to trunk-line and New England territories and also largely to central territory * * *. In any event, * * * the barge-rail traffic via Chicago would not have a fair opportunity to move in competition with the all-rail and lake-rail traffic." (262 I. C. C. 25–26, R. 29.)

The Commission also found that, "The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding, may be accepted as reasonable." (262 I. C. C. 19, R. 23.)

[13] These tariffs never went into effect. The status quo was maintained between October 4, 1945, and November 26, 1945, because of the temporary injunction granted by the district court; and thereafter the eastern railroads have refrained from publishing any new rates.

rates on ex-barge grain in accordance with the relationship so prescribed and approved by the Commission (R. 185). Under these rates the railroads would charge higher rates for transportation of ex-barge grain to all eastern destinations than for transportation of ex-rail grain to the same destinations from the same points of origin on the inland waterways system. To many important eastern destinations this difference would amount to three cents per hundred pounds.[14]

The relationship between the proportional rates on ex-barge and ex-rail grain prescribed by the Commission would result in virtually eliminating the rate advantage of utilizing water transportation inbound to Chicago from important origins to important destinations. For example, the dif-

[14] Although the ex-barge proportional rates are stated in terms of differentials under the local rates applicable to the shipment of grain from Chicago to eastern destinations (262 I. C. C. at 32; R. 36, 37), it is the difference between the proportional rates on ex-barge grain and the proportional rates applicable to ex-rail grain transported to Chicago from the same points on the inland waterways system which is of importance. The local rates are not material to any issue presented by this appeal, for, being much higher than proportional rates, they are never used for the through movement of grain from points west of Chicago to points east of Chicago. To state the relationship of ex-barge proportional rates to ex-rail proportional rates in terms of a relationship to the local rates only confuses the real issue and complicates the process of computing the actual amount of the difference between the ex-barge proportional rates and the ex-rail proportional rates.

ference between the inbound barge and rail rates on grain from Morris, Illinois, to Chicago is 7.5 cents. See Tables IV and V, 262 I. C. C. at 39, 40; R. 45, 46. When this grain moves outbound to New York, the penalty of 3 cents proposed to be imposed on grain shipped to that point plus the handling expenses at Chicago peculiar to ex-barge grain, presently 3.25 cents (262 I. C. C. at 23, 24; R. 27), would leave the barge-rail route from Morris to New York an advantage of only 1.25 cents over the all-rail route between the same points.

But even more drastic results would follow establishment of the approved relationship. The present rate advantage of barge over rail transportation from Kansas City to Chicago is 6.5 cents. See Appendix A, Tables IV and V, 262 I. C. C. at 39, 40; R. 45, 46. The sum of the proposed penalty of 3 cents on ex-barge grain and the handling charges of 3.25 cents at Chicago would leave the water-rail routes from Kansas City to New York an advantage over the all-rail routes of only .25 cent, which would be more than balanced, except on shipments from one elevator located on the river bank at Kansas City, by rail switching and transfer charges of 2.64 cents. See 262 I. C. C. at 23, 24, R. 27; also fdg. 18 (g), R. 189.

Thus, the small rate advantages left the water-rail routes would shrink some territories presently

served by the water carriers so as to include only areas from which the trucking costs to the water are less than the rate advantage, 1.25 cents at Morris, Illinois, and would eliminate the water service altogether at other points and give the rail carriers the grain traffic.[15]

Separate suits (consolidated by the district court's order of September 28, 1945, R. 155) were instituted by A. L. Mechling Barge Line, Inland Waterways Corporation, and the Secretary of Agriculture of the United States[16] and the War Food Administrator (R. 1–57, 57–66, 67–74), to set aside the Commission's decision in so far as it ordered or authorized the railroads to charge proportional rates on ex-barge grain which were

[15] These facts, gleaned from the Commission's report, dispel the force of its finding that, "To trunk-line and New England territories the resulting barge-rail combinations will average about 5 cents less than the corresponding all-rail rates" and "To that territory [central] the resulting barge-rail combinations will average 6.5 cents less than the all-rail combinations." (262 I. C. C. at 31, R. 35.)

[16] The Secretary of Agriculture brought suit under Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291, which provides that in any case before the Commission involving a complaint of a rate or practice relating to the transportation of farm products and affecting the public interest, the Commission shall make the Secretary a party to the proceeding, upon his application for that purpose, with all the rights of a party, including the right to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. See, also, Public Law 733, 79th Congress, Second Session, Section 203 (j).

higher than rates on ex-rail grain, between the same origins on the inland waterways system and the same eastern destinations, by the amounts specified in the differentials prescribed and approved by the Commission.

The United States filed answers (R. 81–84) admitting the allegations of the complaints, and that the Commission's order, in so far as assailed by plaintiffs, was invalid and should be set aside "as erroneous, arbitrary, unsupported by substantial evidence, and contrary to law." The Commission intervened and filed answers asserting the lawfulness of its order (R. 75–80). On October 4, 1945, a temporary injunction was granted to preserve the status quo *pendente lite* (R. 152–155);[17] and on October 16, 1945, the cause was heard on its merits (R. 156–175). On November 26, 1945, the district court entered its comprehensive findings of fact and conclusions of law (R. 177–207), and its final decree (R. 207–209) enjoining and setting aside the Commission's order in so far as assailed by plaintiffs. On Janu-

[17] Appellant argues (Br. pp. 75–77) that this injunction exceeded the court's authority. But it is clear that the temporary relief granted went no further than to preserve the status quo, as to rates, by appropriate means so that the court's final decision might be made fully effective. This is the customary function of an injunction *pendente lite;* and such exercise of equity jurisdiction often occurs in cases involving orders of the Interstate Commerce Commission. *Inland Steel Co.* v. *United States*, 306 U. S. 153, 159–60. In any event, this point is now moot.

ary 24, 1946, appeal was allowed[18] (R. 214–215) and on April 29, 1946, this Court noted probable jurisdiction (R. 228).[19]

[18] By its order of February 21, 1946 (R. 221), the district court amended its order of January 24, 1946, allowing appeal by requiring service of the appeal papers upon the United States by appellant. Appellant contends (Br. pp. 78–82) that such action was error. But it is clear that proper practice requires that all parties to a judgment appealed from be made parties to the appeal. The fundamental rule has long been established that a court should not adjudicate as to a party not actually or constructively before the court. *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, 146–7. In the case at bar, it is plain that by statutory requirement the United States is an indispensable party. Judicial Code, § 208, 28 U. S. C. 46; *Lambert Run Coal Co.* v. *B. & O. R. R. Co.*, 258 U. S. 377, 382. It is likewise obvious, under elementary principles of pleading, as well as the specific provisions of Rule 8 (b) of the Federal Rules of Civil Procedure, that a party has an option whether to "admit or deny the averments" of the complaint. Rule 11 requires a conscientious belief by the attorney signing the pleading that there is good ground to support it. Moreover, an attorney representing the United States is under a peculiar obligation to give due heed to all aspects of the public interest. *Viereck* v. *United States*, 318 U. S. 236, 248. The right of the United States to bring suit in the first instance, or to appeal, is not presented in this case; here the Commission is appellant, and no one questions its right to take an appeal.

[19] Appellant's brief does not raise any questions as to jurisdiction. The reviewability of the Commission's order is indisputable, for as a result of the Commission's finding prescribing the relationship between ex-barge and ex-rail rates, the Eastern railroads are required to publish rates in accordance with that finding (262 I. C. C. 32, R. 36, 37).

SUMMARY OF ARGUMENT

I

The Commission's effort to equalize the rates of water-rail and all-rail transportation instead of preserving the inherent advantages of water transportation violates the legislative intent clearly expressed in the Transportation Act of 1940. The legislative history of that Act clearly shows that the Congress recognized that one of the inherent advantages of water transportation was its low rates. Specific provisions were incorporated for the protection of water transpor-

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This is recognized both by the majority of the Commission, and by the dissenting members.

The proportional rates on ex-barge grain described in the finding are referred to throughout the Commission's report as "prescribed" rates. 262 I. C. C. at 11, 19, 24, 31, 38–40; R. 15, 22, 28, 35, 36, 43–46. Likewise, the dissenting Commissioners, in alluding to the finding, used phrases such as "the majority has decided to increase", "will require" and "respondents must continue." 262 I. C. C. at 34, 35, 37; R. 39, 42.

Under the Commission's finding, publication by the eastern railroads of proportional rates on ex-barge grain which would be any "less favorable to the ex-barge traffic" and any "more favorable to the ex-rail and ex-lake traffic" (262 I. C. C. 32, R. 36) than those prescribed would constitute a departure from the provisions of the finding and subject the carriers to the penalties imposed by the Act. As the requisites of equity are satisfied here, the threat of sanctions makes the finding an order subject to judicial review. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 135–144; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Schenley Distillers Corporation* v. *United States*, 326 U. S. 432, 436.

tation in order to insure to the public the benefits of such low rates. The Commission, on the other hand, has here attempted to raise the rates on water-borne traffic to such an extent as would permit movement over competitive rail routes.

II

The relationship prescribed by the Commission between ex-barge and ex-rail rates violates the Interstate Commerce Act. Section 3 (4) of the Act prohibits discrimination against connecting carriers. Appellees Mechling and Inland Waterways Corporation are entitled to the protection afforded by Section 3 (4). Farmers, shippers, and other parties entitled to the protection of Sections 1, 2, and 3 of the Act are likewise injured by the rate relationship prescribed by the Commission.

III

The Commission's conclusions lack the requisite "rational basis." The Commission's conclusions are based upon irrelevant and immaterial findings. But no findings which would be adequate to support the relationship prescribed are made by the Commission. In the absence of appropriate findings supported by substantial evidence, disclosing substantial differences in transportation conditions and circumstances with respect to the traffic involved, the relationship prescribed by the Commission is plainly prohibited by law

and cannot be justified. The Commission has failed to make findings with respect to the traffic in controversy, i. e. traffic from the area where the barge-rail and all-rail routes are competitive.

ARGUMENT

I

THE COMMISSION'S EFFORTS TO EQUALIZE THE COSTS OF WATER-RAIL AND ALL-RAIL TRANSPORTATION INSTEAD OF PRESERVING THE INHERENT ADVANTAGES OF WATER TRANSPORTATION VIOLATES THE LEGISLATIVE INTENT CLEARLY EXPRESSED IN THE TRANSPORTATION ACT OF 1940

Part III of the Interstate Commerce Act as amended, relating to regulation of water carriers by the Interstate Commerce Commission, was added by the Transportation Act of September 18, 1940 (54 Stat. 898). That legislation was enacted only after considerable opposition had been expressed by water carriers and shippers affected by the proposed extension of the Commission's regulatory authority. These opponents of the measure feared that if the Commission were given power over the rates to be charged by water carriers, it might use such power to the detriment of water transportation by raising rates for such transportation to the level of rail rates.[20]

[20] It is a matter of general knowledge that lower rates constitute one of the chief inherent advantages of water transportation over rail transportation. If this advantage were nullified by imposing equal rates for both modes of transportation, traffic would be diverted to the rails because of the

Similar views were expressed upon the floor of the House and Senate during debate. In order to satisfy the doubts entertained by opponents of the bill and to obtain their support for its enactment into law, the sponsors of the legislation included several specific provisions with the express intent of effectively preserving the inherent advantages of water transportation in the matter of rates.[21]

Thus Senator Wheeler, the Committee Chairman who was in charge of the measure in the Senate, repeatedly pointed to the fact that in three separate places in the bill provisions had been incorporated which would prevent regulation by the Commission detrimental to water transportation.[22]

The first of the provisions thus referred to was that embodied in the congressional declaration of

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superior service available in point of speed and convenience. For the Commission to raise the rates of water carriers is to impose an artificial handicap upon such carriers just as much as if it were to require railroads to slow down their service to the extent necessary to place it upon an equal footing with that furnished by water carriers.

[21] In addition to the policy expressed in the 1940 Act, Congress, for more than 150 years, had consistently followed the policy of adopting measures designed to promote utilization of the nation's navigable waterways and to preserve and foster the inherent advantages of low cost derived from utilization of water transportation. See Ex. 150 before the Commission, Tr. p. 3085.

[22] 84 Cong. Rec. 5873–6, 5883, 6131.

the national transportation policy itself, requiring that the Interstate Commerce Act be "so administered as to recognize and preserve the inherent advantages of each" mode of transportation subject to the provisions of the Act (54 Stat. 899; 49 U. S. C., notes preceding Sections 1, 301, and 901).

The second provision to which Senator Wheeler directed attention became part of Section 305 (c) of the Act (54 Stat. 934, 49 U. S. C. 905 (c)), where the rule is established that:

> Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice within the meaning of any provision of this Act.

The third provision mentioned by Senator Wheeler is found in Section 307 (f) of the Act (54 Stat. 938; 49 U. S. C. 907 (f)), where it is provided that in the exercise of its rate-making power the Commission shall give due consideration, among other factors, "to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed" as well as "to the need, in the public interest, of adequate and efficient water transportation service at the

lowest cost consistent with the furnishing of such services."[25]

At one point in the debate the following colloquy occurred:

> Mr. LUCAS. Returning to the previous discussion with respect to control of inland waterways, I will say to the Senator that I live in the Illinois Valley. We have transportation upon the Illinois River between Chicago and St. Louis and on down the Mississippi to New Orleans. The town in which I live is a focal point for the transportation of wheat and corn down the Illinois. The price of wheat and corn at the elevator there is always 2 or 3 cents higher than it is at elevators some 25 or 30 miles farther inland because of the difference between the rates by rail and those by water.
>
> Under the bill, as I understand it, the Interstate Commerce Commission would have the power, and it would be its duty, to fix rates on the Illinois River with respect to the transportation of that wheat and corn. Would it be possible for the Interstate Commerce Commission to fix the rate the same as the railroad rate from that point to St. Louis?

[25] This provision is similar to the so-called "rule of rate making" in Section 15a (2) of the Act (49 U. S. C. 15a (2)) regarding rail carriers, and was especially designed to protect water carriers and prevent the public from being deprived of the low-cost service furnished by them. 84 Cong. Rec. 6128.

> Mr. WHEELER. Not if the Commission does its duty, because the bill specifically provides that it must take into consideration the inherent advantages of the water carrier. Everyone agrees that goods can be shipped more cheaply by water than by rail.[24]

In response to inquiries from Senator Austin, Senator Wheeler again explained that the natural inherent advantages of water transportation would be protected and preserved against equalization of rates:

> Mr. AUSTIN. So, if there is one type of common carrier which has a natural facility or a natural advantage over another, the bill does not require, indeed, I understand it not to permit, the extinguishment of the natural advantage in competition for the benefit of the competitor which has not the advantage. Am I correct in that interpretation?
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> Mr. WHEELER. The Senator is entirely correct, and I thank him for his statement. In the rate-making provision, and in three different places in the bill, we wrote in such a provision specifically so as to protect them.[25]

This explanation was repeated in answer to another question:

> Mr. ELLENDER. Will the Senator from Montana point out the language in the bill

[24] 84 Cong. Rec. 5879.
[25] 84 Cong. Rec. 5883.

which will give authority to the Interstate Commerce Commission to establish different rates on water transportation in contrast with railroad transportation?

Mr. WHEELER. First, there is the declaration of policy, * * *.

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When the bill speaks of inherent advantages of the shipping interests, it refers to carriers which can transport at a cheaper rate because they can ship by water, by way of canals and the ocean, so they have natural advantages, and they do not have the expense of the upkeep of the rights-of-way, as railroads do.

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Mr. ELLENDER. The Senator stated there were two other places in the bill to which he wished to refer.

Mr. WHEELER. Yes. The next is the rate-making rule.

* * * * *

In other words, if they are fixing the rate for a water carrier, then they must consider the effect on the movement of the traffic of that particular carrier, and if the rate is raised out of proportion, whether or not that carrier would be able to get the business. * * *

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Mr. ELLENDER. In passing upon "adequate and efficient transportation service" will not the Commission have to compare the service of one carrier with that of another?

Mr. WHEELER. Not at all. When the matter came before the committee it did not contain the language which is now in the bill, but the committee took it up with Mr. Eastman and the Commission. We wanted to make it doubly sure that the thing the Senator is afraid of, and that some other people have been afraid of, would not happen; so the committee took the matter up with the Commission and the experts of the Commission, and with Mr. Eastman, and he suggested this particular language because it would have the effect of protecting and doubly protecting against the very thing the Senator has referred to.

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Mr. WHEELER. The third provision, referred to by the Senator from Louisiana, * * * reads as follows:

> That differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice * * *.

So in three different places we have gone on record and done everything that is humanly possible to protect different forms of transportation.[26]

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[26] 84 Cong. Rec. 6126-6128, 6131. Commissioner Eastman likewise regarded these three provisions as furnishing ade-

Following this discussion, Senator Borah asked, with prophetic insight:

> But if we place the regulation of the railroads under the same Commission and the same authority as we place the regulation of water transportation and depend alone upon what are called the inherent advantages for the purpose of distinguishing the water rates from the railroad rates, is it not almost a certainty that in a very short time there will be very little distinction between the rates of the two services?
>
> Mr. WHEELER. I think the Senator is wrong.[27]

The legislative intent emerges with equal clearness from the debate in the House. As explained by Chairman Lea of the Committee on Interstate Commerce:

> The bill very plainly, about as plainly as language can be written, provides for the protection of the inherent advantages of water transportation as contrasted with other means of transportation. In fixing rates the water carrier is assured the advantages of the cheaper rate at which he can transport property.[28]

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quate assurance that the public would not be denied the "benefit and economy" of water transportation. 86 Cong. Rec. 10191-2.

[27] 84 Cong. Rec. 6149.

[28] 84 Cong. Rec. 9862. Reference was also made to the provisions which became Sections 307 (f), 307 (d), and 305 (c) of the Act (49 U. S. C. 907 (f), 907 (d), and 905 (c)). It is provided in Section 307 (d):

After the bill had been the subject of conference, the House conferees said in their statement accompanying the conference report:

> The conferees are unanimously in harmony in the viewpoint that the inherent advantages of each type of carrier should be preserved for the benefit of the Nation. Legitimate regulation must look to the protection of the economic advantage of each type of carrier against destructive competition of the other. No carriers should be required to charge unreasonable rates for the benefit or purpose of compelling diversion of traffic to a competitor.
>
> The other provisions of this bill afford ample protection for the preservation of the inherent advantages of water transportation.
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> The new declaration of policy to be embodied in the Interstate Commerce Act provides a rule of interpretation applicable to all the provisions of that Act, namely, that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." The declaration of policy also asserts it to be "the national transportation policy of the Congress to

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In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

provide for fair and impartial regulation of all modes of transportation" subject to the Act. It further declares that the provisions of the Act are to be "so administered as to recognize and preserve the inherent advantages of each."[29]

Referring to Section 307 (f) and the requirement that the Commission consider the effect of rates upon the movement of traffic, it was declared that:

> This rule of rate making for water transportation is wholly inconsistent with the theory that the Commission might prescribe an unreasonable rate for a water carrier for the purpose of forcing its traffic to a competing carrier.
>
> Other provisions of the conference substitute, further protect water carriers in their right to operate at low rates.[30]

After mentioning Section 305 (c), it is noted that:

> Outside of special provisions designed to protect water carriers the rule of reasonable rates in itself prohibits the imposition of an unreasonably high rate for any carrier for the purpose of aiding a competitive carrier. There is no authority for the contention that the Commission has any right to require a rate higher than is reasonable for the purpose of diverting

[29] 86 Cong. Rec. 10172.
[30] 86 Cong. Rec. 10172.

traffic from any given type of carrier to a competitor.[31]

This review of the legislative history, of which the foregoing quotations are sufficiently illustrative, demonstrates that the major purpose of Congress in adopting the national transportation policy was to protect and preserve, as an inherent advantage, the lower rates of carriers, particularly water carriers, and to impose upon the Commission the duty to administer the various provisions of the Interstate Commerce Act so as not only to protect and preserve the lower rates but to foster the inherent advantage of lower rates in every way available to the Commission.

Obviously, the policy provided no justification for the attempt which the Commission has made to equalize the transportation costs on grain over the barge-rail and all-rail routes. On the contrary, the policy was adopted to preclude such action. But instead of interpreting the policy to mean that the outbound ex-barge proportional rail rates must be adjusted so as to reflect fully the lower inbound barge rates, the Commission prescribed and approved the relationship here attacked. It treated ex-barge grain as entitled to nothing better than "a fair opportunity to move in competition with the lake-rail and all-rail traffics". (262 I. C. C. at 29, R. 33.)

In establishing the relationship between ex-barge and ex-rail rates set forth in its report,

[31] 86 Cong. Rec. 10172.

the Commission has interpreted the policy as if it imposed upon the Commission a duty to protect the traffic of railroads by adjusting rates over the water-rail routes so that the through rates over water-rail routes will not attract traffic from all-rail routes; in other words, to require that transportation costs over water-rail routes be equalized with those over all-rail routes. This basic defect in the Commission's mode of reasoning is clearly disclosed where it states that:

> The barge-rail rates are far below the all-rail rates from the same and other Illinois origins. This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins and it is difficult to see, with such extreme disparities, how such requests could properly be denied. (262 I. C. C. 20, R. 24).[32]

This conclusion reveals that the Commission considers itself under a duty to equalize economic opportunities among shippers utilizing the barge-rail and all-rail routes. The Commission's report shows that it interprets the Act as requiring that the barge-rail and all-rail rates be so adjusted that grain from points located on both barge-rail and all-rail routes may move freely by either

[32] The Commission's fear there expressed "that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure" does not provide any legal basis for imposing higher rates on ex-barge grain. *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U. S. 499, 507.

route. In other words, the Commission felt obliged to equalize competitive opportunities between the barge-rail and all-rail routes without regard to the fact that inbound barge rates reflect a natural or "inherent" advantage which is not available to shippers not having access to water transportation. But such inherent natural advantage resulting in lower rates for the benefit of those who are in a position to utilize them must be recognized and preserved, if the congressional intent manifested in the national transportation policy is not to be flouted.[33]

The Commission's treatment of the relationship between the rates involved is shown by the following discussion (262 I. C. C. 23, 24–26, 29; R. 27–29, 33):

> The proportionals from Chicago on the ex-barge grain being substantially the same as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billing and to utilize such grain in their hedging operations. The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago

[33] Even apart from the specific mandate that the inherent advantages of water transportation must be preserved, it has long been settled law that it is not the function of the Commission under the Interstate Commerce Act "to equalize fortunes, opportunities, or abilities" among competitors in the economic struggle for existence. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

price, less the barge rate and the applicable costs and margins peculiar to the barge traffic. Where the deductions are less on the barge than on the rail traffic the net price to the farmer is correspondingly greater, the difference diminishing as distance from the Waterway increases until finally it disappears altogether. * * *

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The primary interest of the Illinois farmer having access to the Waterway is in the greater net price above referred to. The barge lines and the Waterway elevator operators and dealers are primarily concerned with the volume of traffic moving through their facilities.

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The principal questions presented on further hearing are whether the ex-barge traffic from Chicago is entitled to proportionals lower than the local rates, and if so, how much lower.

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Under the proposed schedules the rates on the ex-barge traffic made on the full local basis, much higher than the ex-rail and ex-lake proportionals or specifics, would result in barge-rail combinations higher in some instances than the all-rail rates from the same origins. Under such a basis Chicago dealers could not use grain backed by barge billing in their marketing and hedging operations without a substantial discount in price. The record as amplified on further

hearing shows that the proposed schedules would lessen and possibly destroy the barge-rail traffic to trunk-line and New England territories and also largely to central territory in view of the lake local, joint rate, transit, and discount situations above referred to. Whether they would restore the traffic to the all-rail routes is problematical. They might have the effect of diverting the grain from these northern Illinois origins to barge movements to the South. In any event, under the proposed schedules, the barge-rail traffic via Chicago would not have a fair opportunity to move in competition with the all-rail and lake-rail traffic.

We conclude that the ex-barge traffic is entitled to proportionals lower than the local rates.

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In determining how much lower the ex-barge proportionals should be than the local rates and how much higher than the ex-rail and ex-lake proportionals or specifics, consideration must be given to their effect on the movement of the traffic. The present combinations on the barge-rail traffic, being so much lower than the all-rail rates from the same and other origins have diverted and will continue to divert a substantial portion of the traffic to the barge-rail routes via Chicago from the all-rail routes, including those through Indianapolis and other markets. This is due, in

part, to the level of the barge rates. However, it is also partly due to the level of the present ex-barge proportionals. * * *

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* * * Under the proportionals approved herein on the ex-barge traffic, it may be necessary to accord grain backed by barge billing some discount under the Chicago price, but certainly there is no reason why such discount should be as great as the increases resulting from such proportionals.

If the rates on the ex-barge traffic are adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto," the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traffics * * *.

It is obvious from the Commission's report that the ex-barge proportionals prescribed by it are merely a compromise between the existing rates on ex-barge grain and the higher local rates, application of which was proposed by the railroads in the schedules under suspension. The Commission attempted to raise the rates on water-borne traffic to such an extent as would permit movement over the competitive rail route. This is the meaning of the Commission's statements "that proportional rates should be so adjusted as to * * * be non-destructive of either" form of transportation, and that the barge-rail traffic should "have a fair opportunity to move in competition with the lake-rail and

all-rail traffics." (262 I. C. C. at 26, 29; R. 30, 33.) In plainer language, what the Commission is here saying is that it believes that the all-rail routes serving points having access to water transportation should be entitled to share in, or recapture, the traffic which is now handled by the barge-rail routes. But the national transportation policy as established by Congress does not permit the Commission to exercise this function of compromise and conciliation. It requires that the inherent advantages of water transportation be fully recognized and protected. This means that if the water transportation can be furnished at just and reasonable rates which are so much lower than the comparable rail rates that all the traffic is attracted to the water carriers, such carriers are entitled to transport all the available traffic unless and until the railroads lawfully reduce their rates to the extent necessary to regain a portion of the traffic. That such was the legislative intent, which the Commission has here violated, is abundantly clear from the legislative history of the 1940 Act heretofore reviewed.

The Commission has not only violated the national transportation policy in prescribing the relationship in proportional rates here in issue, but it has erroneously attempted to rest the validity of this relationship upon the policy. This attempt is shown by the following excerpt from the Commission's report:

> The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same outbound proportionals if, as the Act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower inbound cost but, in addition, would extend to the barge-rail transportation most of the advantages of all-rail transportation. However, all of the ex-barge traffic can and should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practicable the commercial needs thereof. (262 I. C. C. 31; R. 35.)

The Commission has here treated the present ex-rail proportional rail rates outbound from Chicago as if they were depressed factors of the through all-rail rates from points west of Chicago, made lower than the local rates from Chicago in order to move grain over the through all-rail routes. It views the utilization of those depressed factors as an inherent advantage of all-rail transportation which would not be preserved if ex-barge grain were accorded outbound proportional rates equal to those on ex-rail grain. Stated differently, the Commission has here said that the national transportation policy requires that the ex-rail proportional rates be protected, as an inherent advantage peculiar to all-rail transportation, by raising the ex-barge rates to a level

which would give the ex-rail proportionals maximum protection from water competition and still meet "so far as practicable the commercial needs" of the barge-rail traffic; in other words, ex-barge grain should be charged the local rates outbound from Chicago, except to the extent that reduction is imperative in order to permit the movement of barge-rail traffic."

But the national transportation policy is that the Interstate Commerce Act shall be administered so as to recognize and preserve the inherent advantages of each mode of transportation. Where, as here, relatively higher proportional rail rates on ex-barge grain outbound from Chicago would

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" In thus relying upon the traditional railroad philosophy of charging "what the traffic will bear" (*Livestock-Western District Rates*, 176 I. C. C. 1, 82–83), the Commission treats the national transportation policy as applicable only in the case of local rates, and not to through rates over water-rail routes. But there is no warrant in the statutory language for such a distinction; the charges for through transportation must also reflect the inherent rate advantages of water carriers if the policy is not to be nullified. Notwithstanding the enactment of the national transportation policy the Commission applied the theory "that the carrier should decide what, in view of all the circumstances, the articles could afford to pay and then charge neither more nor less—certainly not less, because then the profit would be lower than it otherwise would, and not more, because a higher charge would curtail the amount of the traffic and the revenue derived therefrom, or possibly destroy the shipper and lose all his freight." P. 15, *Comparison of Rail, Motor, and Water Carrier Costs*, prepared by the Board of Investigation and Research, S. Doc. No. 84, 79th Congress, 1st Session, dated September 20, 1944.

destroy or seriously curtail the inherent advantage of utilizing low cost water transportation inbound to Chicago, the policy requires that the outbound rates shall be constructed so as to preserve this inherent advantage of barge transportation.

Moreover, the Commission's construction of the national transportation policy would treat as of no consequence the fact that the eastern railroads for many years have transported both ex-barge and ex-rail grain outbound from Chicago for the existing proportional rates. Whatever may be the normal rule of rate-making, the policy requires that any adjustment in the outbound rates be made so that ex-barge grain is not left at a disadvantage. We submit that the policy fails to provide any support for the proposition that ex-barge grain should be denied treatment equal to that given ex-rail grain merely because ex-barge grain might bear higher charges and still move to the market place.

In addition, the Commission's construction would be tantamount to a holding that the policy restricts the protection afforded connecting carriers, shippers and other persons and classes by the Interstate Commerce Act, which prohibits any discrimination in rates and charges within the power of Congress to condemn. *Mitchell* v. *United States*, 313 U. S. 80, 94. As shown by the legislative history, there is no basis for the con-

clusion that Congress intended that the policy should modify in any degree the protection given by the Act. On the contrary, the policy was adopted to preclude such a result.

The Commission argues that the policy does not define the inherent advantages of each mode of transportation and that, necessarily, it is left to the Commission to ascertain and evaluate the inherent advantages of each mode of transportation where they collide. The collision here is between the low inbound water rates and the higher inbound rail rates. To compensate for the low water rates, the Commission has increased the outbound rail rates on the barge traffic. But plainly the higher cost of rail transportation is not one of its inherent advantages.

Sound statutory construction would seem to require that the Commission turn to the legislative history to learn the congressional intent in using the term "inherent advantages" which, the Commission has conceded, is not defined in the national transportation policy. But the Commission has not mentioned this history.

There the Commission would have found the explanation of Congressman Halleck, a member of the Subcommittee of the House Committee on Interstate and Foreign Commerce:

> Rail transportation is the most valuable transportation because it is faster and more convenient. The water people will admit that. If a person had the same rate he

> would ship by rail rather than water. As a result the ceiling of rates is fixed by the railroads. The water carriers operate under that ceiling at a competitive point because their costs are less. The bill recognizes that differential and the reason supporting it. This bill provides for the continuation of that differential.[35]

Plainly, greater speed and convenience are the principal inherent advantages of rail service. We have found no reference to others in the legislative history. But the lower rates of the water carriers would not deprive the public of the more valuable greater speed and convenience of the rail service.

Accordingly, there is no collision here between the inherent advantages of water and rail service. The collision is between the healthy rate competition of competing modes of transportation, which Congress intended to preserve. It would be just as reasonable to require the rail lines to reduce their speed as it is to deprive the public of the inherently lower rates of the water carriers.

II

THE RELATIONSHIP PRESCRIBED BY THE COMMISSION, BETWEEN EX-BARGE AND EX-RAIL RATES VIOLATES THE INTERSTATE COMMERCE ACT

Apart from the specific protection and preservation of the inherent advantages of water transportation which were advisedly incorporated in the Transportation Act of 1940, it is clear that

[35] 84 Cong. Rec. 9711.

the relationship here prescribed and approved by the Commission and sought to be put into effect by the eastern railroads between the proportional rates for ex-barge traffic and the proportional rates applicable to ex-rail and ex-lake traffic is plainly prohibited by various provisions of the Interstate Commerce Act under the circumstances disclosed in the Commission's report.

The proportional rates here in issue differ from the local rates in that they apply only to movements to and from points beyond the initial carrier's line. These proportional rates are not applicable to movements commencing and ending on the line of the carrier publishing them. The carrier's local rates would apply to such transportation. The fact that the rates in issue are "proportional" is of no significance. The rates of carriers subject to the Act must conform to the transportation standard, whether they be joint, local or proportional. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 771, 776. In fact, the Commission concedes that proportional rates must be tested by the same criteria as other separately established rates. (262 I. C. C. 26, R. 30.)

Where the Commission prescribes rates for the future, such exercise of power must be confined to the obvious purpose and directions of the statute. See *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, 216. "Obviously, what the carrier may not lawfully do, the Commission may not compel." *Texas & Pa-*

cific Railway Company v. *United States*, 289 U. S. 627, 637. Hence, the Commission's determination with respect to the validity of the prescribed relationship in rates is subject to the same statutory tests as rates which are published by the carriers in the exercise of managerial discretion.

Under the relationship in proportional rates prescribed by the Commission, grain transported to Chicago by barge would be assessed higher proportional rates in all cases for the movement outbound by rail from Chicago to eastern destinations than the proportional rates which the eastern railroads would apply on the outbound haul from that point to grain moved to Chicago by rail from points on or near the waterways where the inbound water and rail carriers compete for traffic. To the most important destinations, this difference would amount to 3 cents per hundred pounds.

A WHERE, AS HERE, APPLICATION BY CARRIERS OF A DIFFERENCE IN RATES WILL RESULT IN INJURY TO THEIR CONNECTING LINES, THE DIFFERENCE IN RATES IS UNLAWFUL

The relationship prescribed by the Commission appears to be a plain violation of Section 3 (4) of the Act (49 U. S. C. 3 (4)). That section provides that rail carriers subject to Part I of the Act "shall not discriminate in their rates, fares, and charges between connecting lines" and that the term "connecting line" means "the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III." Appellees Mechling and Inland

Waterways Corporation are water carriers now subject to Part III of the Act and are entitled to the protection afforded by Section 3 (4).*

Unlike Section 3 (1) of the Act, which permits differences in rates and charges assessed to shippers and other persons and classes named therein where they are not "undue" or "unreasonable", Section 3 (4) provides, without any qualification, that carriers "shall not discriminate in their rates, fares, and charges between connecting lines". Thus the latitude given to the Commission under Section 3 (1) is denied to it under Section 3 (4).

In numerous decisions, beginning at an early date, the Commission has given effect to the prohibition against discrimination by railroads, in

* The Commission has suggested (footnote 11, Br. p. 48) that Section 3 (4) of the Act does not operate in favor of the barge traffic because it is intrastate commerce, exempted from regulation by Section 303 (j), and, as to Mechling, that his traffic is beyond the Commission's jurisdiction under Section 303 (b) where not more than three kinds of grain are transported in a given movement. As to the first suggestion, the Commission has granted certificates to appellees Mechling and The Federal Barge Line, operated by Inland Waterways Corporation, authorizing operations by them as interstate common carriers of grain (262 I. C. C. 11, 19; R. 14, 23), which makes them carriers subject to the Act (*General Transp. Co.* v. *United States*, 65 F. Supp. 981 (D. Mass.), aff'd Oct. 14, 1946) and thereby entitled to the protection afforded by Section 3 (4). With respect to the second suggestion, the fact that certain traffic is exempted from regulation under Section 303 (b) of Part III manifestly does not authorize carriers subject to Part I of the Act to discriminate against such traffic, particularly where it is transported to the point of interchange by carriers entitled to the protection of Section 3 (4).

the matter of rates and charges, among connecting lines. In *New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 4 I. C. C. 702, the Commission interpreted the prohibition as follows (p. 720):

> When, therefore, the statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the statute it is only a meaningless enactment.

Prior to the proceeding here under review, the Commission has consistently condemned discrimination against connecting water carriers under circumstances substantially identical with those in the instant case.

Thus, in *Chattanooga Packet Co.* v. *Illinois Central R. Co.*, 33 I. C. C. 384, 391-2, decided in 1915, the Commission considered a complaint by a water carrier on the Tennessee and Ohio Rivers, that the rail lines north of the Ohio River applied the local rates to and from river points at which they interchanged traffic with the water carriers, but that on traffic routed over the lines of connecting rail carriers the northern railroads applied lower proportional rates to and from the

river crossings. In a well-reasoned report, the Commission said (pp. 391–2):

> Plainly by these provisions the only difference which carriers can make in the treatment of their connections is such as can be justified by differences in the conditions and circumstances surrounding the service rendered. By the provisions of section 3 carriers are prohibited from charging more for traffic between the same points routed over one connecting carrier than for that routed over another, unless the service which they perform is different in one case than in the other. [Citing cases.]
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> The Commission has held that a proportional rate, the use of which is limited to shipments over a particular line, is unjustly discriminatory. *Bascom Co.* v. *A., T. & S. F. Ry. Co.*, 17 I. C. C., 354; *Rosenbaum Bros.* v. *L. & N. R. R. Co.*, 22 I. C. C., 62.
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> * * * * *
>
> The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The "like circumstances and conditions" referred to in section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight* v. *U. S.*, 167 U. S., 512; *I. C. C.* v. *A. M. R. R. Co.*, 168 U. S., 144. The shippers who desire to avail themselves

> of the water-and-rail route must be given equal treatment with those who ship all rail. Any discrimination which exists must not exceed that which is warranted by the differences in the circumstances and conditions of the haul over defendants' lines. *Sondheimer Co.* v. *I. C. R. R. Co.*, 17 I. C. C., 60.
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> * * * * *
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> If carriers are permited to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters.

The same question was presented in *Restriction of Proportional Rates on Cotton*, 161 I. C. C. 113, 116 (1930), where the southern railroads proposed to restrict the application of proportional rates from southeastern and Carolina points to Cairo, Illinois, and other Ohio and Mississippi River crossings so that the proportional rates would not apply to traffic by barge from the river crossings but would be applicable to traffic destined to move by rail from the crossings. The Commission there said:

> The real question at issue is whether the resulting rates would be unduly prejudicial to barge-line traffic under section 3 of the interstate commerce act in comparison with rates upon similar traffic moving be-

yond the river crossings over rail lines, and also in comparison with rates to these destinations from New England territory. Manifestly, the barge line would be unable to secure any traffic from Cairo to Dubuque, originating at Atlanta, as the rail-and-river rate would exceed the all-rail rate by 11 cents. It appears that the cost of handling traffic by the southern carriers at the river crossings is no greater when delivered to the barge line than when it is delivered to their northern rail connections. If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters. *Chattanooga Packet Co.* v. *I. C. R. R. Co.*, 33 I. C. C. 384, 392.

Again, in *Ex-River Grain and Grain Products from Cairo and Metropolis, Ill., to Mississippi Valley*, 177 I. C. C. 206 (1931), the railroads proposed to restrict the application of proportional rates on grain and grain products so that they would apply only to traffic moving outbound by rail; but the Commission said (p. 208):

> There is nothing in this record to indicate that the conditions under which ex-river traffic is or may be handled at Cairo are different from the conditions under which similar traffic is handled all rail. Re-

spondents offered no testimony in justification of charging a higher rate on ex-river grain from Cairo than applies all rail. As hereinbefore stated, on traffic from St. Louis respondents publish the same proportional rate on grain regardless of whether the traffic into St. Louis moves ex-river or ex-rail. Shippers who desire to avail themselves of the water-and-rail route must be given equal treatment with those who ship all-rail. Any difference in rates must not exceed that which is warranted by the difference in the circumstances and conditions surrounding the transportation over respondents' lines. If rail carriers are permitted to apply higher rates on ex-river than on ex-rail traffic merely because of the different mode of transport employed prior to delivery to them, they will be in a position to destroy water competition and to deprive shippers of the advantage of their location upon navigable waters. See *Chattanooga Packet Co.* v. *I. C. R. R. Co.*, 33 I. C. C. 384, 392.

Where railroads have attempted to discriminate among connecting water carriers in establishment of through routes and joint rates, the Commission has not hesitated to deal firmly with the situation. Thus, in *Nueces County Navigation District No. 1* v. *Baltimore & Ohio R. Co.*, 223 I. C. C. 75, 95, 98 (1937) the Commission said:

> The issue here is whether or not a rail carrier may, by the adjustment of its rates,

determine the flow of the particular traffic in the interest of a boat line which is its subsidiary, and in order to assure the movement of the traffic by way of its own boat line, commercially close another port on its line and make impracticable the solicitation of the business by and through the complaining port.

* * * * * *

We have previously found that rail carriers cannot choose the particular boat lines with which they will establish through routes and joint rates. In *Pacific Nav. Co.* v. *Southern Pac. Co.*, 31 I. C. C. 472, we stated at page 479:

> If rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint rates, they will be able to dictate who shall operate on the water and who shall not, for a boat line which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business. The spirit of the act to regulate commerce is to maintain the freedom of our ports and to allow boat lines to engage in traffic upon equal terms. To permit the rail carriers serving a port to favor one boat line or another would destroy the freedom of competition between boat lines which the act is intended to preserve, and would practically close ports to all but the favored vessels.

The Commission has recently not only construed Section 3 (4) of the Act to prohibit railroads from discriminating in rates among connecting water lines but also has held that such discrimination would not be consistent with the national transportation policy adopted by Congress in 1940. In *Maximum Rate Provision, Ocean-Rail to Southwest*, 258 I. C. C. 63 (1944), the railroads serving Arkansas, Louisiana, Oklahoma and Texas proposed to cancel a provision in their tariffs to the effect that the ocean-rail rates from the Atlantic seaboard to the Southwest should not exceed the ocean-rail rates from the Atlantic ports to Deming, New Mexico, and to apply in lieu of that provision higher rates specifically named in the proposed tariff. The Commission rejected the proposal with the following words (pp. 69–70):

> If the proposed cancellation became effective, the rates from north Atlantic ports to Deming would apply only at points on specific routes in connection with the Morgan Line and the Southern Steamship Company. Traffic in connection with all other steamship lines would be subject to the higher specific rates to those points. For example, a rate of $1.10 applies on cordage from New York to El Paso in connection with the Morgan Line to Galveston or Houston, thence Southern Pacific. But if the shipment were tendered

> to the Southern Pacific at those ports by any other steamship line, the rate would be $1.66, despite the fact that the service rendered in each instance by the rail carrier would be the same. This would result in undue prejudice to those steamship lines in violation of section 3 (4) of the act * * *.
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> * * * * * *
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> The effect of the proposal would be disadvantageous to the north Atlantic and Gulf ports and to shippers at points in Atlantic seaboard territory who ship over ocean-rail routes to the Southwest. It would also render more difficult the resumption of coastwise operation by certain steamship lines by restricting the destination area to which competitive traffic would move in connection with those lines at rates lower than those over the all-rail routes. The national transportation policy, as declared by the Congress, requires the act to be so administered as to recognize and preserve the inherent advantages of each mode of transportation to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail. Respondents' proposal is not consistent with that policy.

It is thus clear that prior Commission decisions have uniformly treated as forbidden by Section 3 (4) such discrimination against connecting water carriers as is involved in the case at bar.

B. WHERE, AS HERE, APPLICATION BY CARRIERS OF A DIFFERENCE IN RATES WILL RESULT IN INJURY TO SHIPPERS OR PERSONS AND CLASSES PROTECTED BY SECTIONS 1, 2, AND 3 (1) OF THE ACT, THE DIFFERENCE IN RATES IS UNLAWFUL

As indicated by the foregoing cases, the prescribed relationship between ex-barge rates and ex-rail rates on grain also violates the long established prohibitions of Sections 1, 2, and 3 of the Act against unreasonableness, unjust discrimination, and undue prejudice. The prescribed relationship is subject to the same criticism which was directed against the proposed schedule by the late Commissioner Joseph B. Eastman in his dissenting opinion. Mr. Eastman said:

> In view of the long continuance of the reshipping rates and having in mind the level of the proportional rates which we have prescribed on grain in western territory, it can be urged with force that the local rates are unreasonable, under section 1, for application on this ex-barge grain. However, it is unnecessary to go into this, if, as I believe, the proposed schedules are clearly unlawful under sections 2 and 3.
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> * * * * *
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> Clearly this is a case where it is proposed to charge persons shipping ex-barge grain a greater compensation than is charged other persons shipping ex-rail or ex-lake grain for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." and clearly,

also, this would result in a violation of section 2.

The same facts which spell a violation of section 2, if the proposed schedules become effective, likewise spell a violation of section 3, when coupled with the positive evidence that these schedules will result in injury to the producers of ex-barge grain, at least during the season when transportation by lake from Chicago is not available. In this connection it was pointed out in the prior report that under section 3 (1), as amended by the Transportation Act of 1940, "undue discrimination, prejudice, or disadvantage by rail carriers to traffic of any other carrier, by water for example, is not unlawful." The undue prejudice with which I am concerned, however, is not to the operators of the barge lines but to the shippers of the grain. (248 I. C. C. 321–323.)

Unreasonableness of the rates for application on ex-barge traffic may be shown by comparison with the ex-lake and ex-rail rates on the same commodity. It is well-settled law that reasonableness of challenged rates may be determined by comparison with other rates on similar commodities in the same general territory.[37] Application of

[37] *St. Louis Southwestern Railway Company* v. *United States*, 245 U. S. 136, 145; *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, 480; *United States* v. *Northern Pacific Railway Co.*, 288 U. S. 490, 500; *Chicago, Rock Island & Pacific Railway Company* v. *United States*, 274 U. S. 29, 32.

this test is even more pertinent here than in most cases, since here it is proposed to charge different rates for transporting the same kind of grain between the same points. Such transportation might frequently be in the same train. Application of different rates would be predicated solely upon the fortuitous circumstances whether the grain had been transported to Chicago by barge or by rail. The long continuance of the equality of treatment accorded ex-barge and ex-rail grain by the eastern railroads is evidence of the reasonableness of the past relationship, and of the unreasonableness of the higher rates to be charged under the prescribed relationship for transportation of ex-barge grain. Furthermore, the lower proportional rates applicable on ex-rail and ex-lake grains would be an appropriate standard for measuring and condemning as unreasonable the higher rates on ex-barge grain.

As was said by Commissioner Alldredge in his dissent:

> If there is no justification for the increase in rates which the majority here extends to the eastern rail lines—and I do not think there is in the circumstances of this case—then those increases are unjust and unreasonable under section 1 of the act and the declared purpose of the national transportation policy under which all provisions of the act are to be administered, and should not be sanctioned. (262 I. C. C. at 35, R. 39.)

Given proof of injury resulting from a difference in rates, it is well established that the "discrimination", "preference" and "prejudice" prohibited by Sections 2 and 3 (1) of the Interstate Commerce Act are presumptively "unjust", "undue" and "unreasonable" in the absence of a showing that differences in transportation circumstances and conditions justify the difference in rates. Carriers "may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful." *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, 637. See, also, *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 444; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524; *Atchison, T. & S. F. Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591; *Anchor Coal Co.* v. *United States*, 25 F. 2d 462, 471.[38]

[38] The Commission's own decisions recognize the same principle. *Ashland Fire Brick Co.* v. *Southern Ry. Co.*, 22 I. C. C. 115, 121; *Chamber of Commerce of New York* v. *N. Y. C.*

It cannot be seriously disputed that the relatively higher proportional rates on ex-barge grain prescribed and approved by the Commission will result in injury not only to appellees Mechling and Inland Waterways Corporation, but also to the producers and shippers of grain served by the water carriers and the territory served by them.

The Commission's report makes this clear. It found that "The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic. Where the deductions are less on the barge than on the rail traffic the net price to the farmer is correspondingly greater, the difference diminishing as distance from the Waterway increases until finally it disappears altogether." (262 I. C. C. 23, R. 27.)

The Commission further found that, "The primary interest of the Illinois farmer having access to the Waterway is in the greater net price above referred to. The barge lines and the Waterway elevator operators and dealers are primarily con-

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& H. R. R. Co., 24 I. C. C. 55, 63, 76, 75; *Maritime Association of Boston* v. *Ann Arbor R. Co.*, 95 I. C. C. 539, 565; *Mississippi Cotton Seed Crushers Association* v. *Atlanta, Birmingham & Coast Railroad Company*, 238 I. C. C. 87; *Continental Steel Corporation* v. *New York, Chicago & St. Louis Railroad Company*, 256 I. C. C. 167.

cerned with the volume of traffic moving through their facilities." (262 I. C. C. 24, R. 27.)

The Commission conceded that the relatively higher proportional rates prescribed and approved for ex-barge grain will result in Chicago dealers refusing to purchase ex-barge grain except at a discount from the Chicago price. "Under the proportionals approved herein on the ex-barge traffic, it may be necessary to accord grain backed by barge billing some discount under the Chicago price, but certainly there is no reason why such discount should be as great as the increases resulting from such proportionals." (262 I. C. C. 29, R. 33.) The fact is that all grain of like kind and grade reaches a common price at Chicago, regardless of the cost, mode or length of inbound transportation. (Fdg. 10, R. 180.) Accordingly, there can be no doubt that dealers will refuse to purchase ex-barge grain in competition with ex-rail grain except for the full discount from the Chicago price equal to the difference between the outbound proportional rates on ex-rail and ex-barge grain.[39]

[39] The only possible exception would be during the season when water transportation on the Great Lakes would be available for the outbound movement. But dealers generally know neither the ultimate destination nor the eventual purchaser when they buy grain on the Chicago market, and they would undoubtedly offer prices for ex-barge grain which would give them complete freedom with respect to resale of

Such discounts would reduce the net prices received by the farmers having access to the Waterway. The reduction in the spread between the net price paid the farmers for grain transported by barge and rail would shrink the territory served by the water carriers and this would manifestly curtail the volume of grain moving through the facilities of both the Waterway elevator operators and the barge lines, with corresponding decreases in their returns.[40]

As the Commission's report shows that not only the water carriers but also the producers, shippers, and the territory served by the water carriers, will be injured by the relatively higher proportional rates on ex-barge grain,[41] it follows that

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the grain. See *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 279 U. S. 768, 777–778.

[40] The district court made extensive findings with respect to the consequences which would result from application of the relatively higher rates on ex-barge grain. (Fdgs. 17–21, R. 185–190.)

[41] It may be argued that shippers utilizing the barge-rail routes would suffer no damage from application of the relatively higher ex-barge proportional rates, for the total cost of transportation from origin to destination (made up of the combination of the barge rate proper, the handling charges peculiar to barge grain and the higher ex-barge proportional east of Chicago) would be no greater than the total rate (comprising the inbound rail rate factor to Chicago plus the ex-rail proportional) paid by all-rail shippers from points on the inland waterways system. But it is the loss of the inherent advantage of low-cost water transportation that would injure the shipper located on the barge line. It is no

the injury creates a presumption of unjust discrimination and undue prejudice to them and in the absence of some justification, Sections 2 and 3 (1) of the Act prohibit the prescribed and approved relationship in proportional rates.

Section 2 of the Act (49 U. S. C. 2) condemns as unjust discrimination the collection from any person or persons of a greater or less compensation than the carrier collects "from any other person or persons for doing for him or them a like and contemporaneous service in the trans-

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answer to say that shippers in a position to utilize the waterways will not be damaged by higher rates because those rates will be no higher than the rates paid by shippers burdened with the disadvantage of high cost rail transportation.

Moreover, the eastern railroads cannot be relieved from the obligation to treat shippers equally imposed by Sections 2 and 3 by reason of the existing relationship maintained by western railroads between inbound rail rates and barge rates. The western railroads are under no obligation to shippers utilizing the barge-rail routes to maintain the present relationship between inbound rail rates and barge rates. "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 506. It would be a novel rule of law which would relieve from liability a carrier maintaining a discriminatory rate relationship merely because another carrier over which the first carrier had no control maintained a rate level which imposed a burden upon shippers on its line no greater than the burden upon shippers who were victims of the discrimination. Further, any such argument would fail to justify the injury which the discriminatory rate relationship would impose upon the water carriers and the territory served by them.

portation of a like kind of traffic under substantially similar circumstances and conditions".[42]

Although the nature of the antecedent haul has been treated by the Commission in the decision here under review and in one prior case, *Ex-River Grain from St. Louis to the South*, 203 I. C. C. 385, as a circumstance to be considered in determining whether a relationship in rates is violative of Section 2, the weight of the Commission's decisions supports the view that differences in prior transportation are not pertinent to the issue.[43] Prior and subsequent transportation may be considered where proportional rates are challenged as violating Section 2 because of being

[42] As pointed out by Commissioner Eastman, citing numerous decisions of this Court, the "circumstances and conditions" to which section 2 refers are those which are "incident to the transportation service and not those which are extraneous thereto." (248 I. C. C. at 316.) *Wight* v. *United States*, 167 U. S. 512; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission* v. *Baltimore and Ohio R. Co.*, 225 U. S. 326; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344.

[43] *Chattanooga Packet Company* v. *Illinois Central Railroad Company*, 33 I. C. C. 384; *Raw Sugar, New Orleans to Gramercy and Reserve, La.*, 206 I. C. C. 231; *Restriction of Proportional Rates on Cotton*, 161 I. C. C. 113; *Ex-River Grain and Grain Products from Cairo and Metropolis, Ill., to Mississippi Valley*, 177 I. C. C. 206; *Inland Navigation Company* v. *Wabash Railway Company*, 43 I. C. C. 588.

lower than local rates. *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197. But here what is involved is the relationship of proportional rates among themselves; and the prior transportation is the same except for the circumstance that ex-barge grain moves by water instead of rail from the point of origin. It is not local rates, but the lower ex-rail proportional rates which here constitute the standard of comparison for challenging the validity of the ex-barge proportional rates."

Section 3 (1) of the Act (49 U. S. C. 3 (1)) is more comprehensive than Section 2. *Mitchell* v. *United States*, 313 U. S. 80, 95. "It differs from § 2 in that it may be availed of not only by shippers but by any other person who has been or may be injured by an inequality of rates." *Barringer & Co.* v. *United States*, 319 U. S. 1, 13. It prohibits undue prejudice or preference "to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic." Shippers of grain, as well as water carriers [45] utilizing the inland waterways system, are clearly entitled to the

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[44] Proportional rates are factors governing through movements, and are regarded as reflecting substantial dissimilarity in "circumstances and conditions" as compared with local rates. See the discussion by Commissioner Eastman in 248 I. C. C. at 317–19; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 684–5.

[45] Section 3 (1) carries a proviso that the prohibitions thereof shall not be construed to apply to discrimination,

protection afforded by Section 3 (1). Such persons will be confronted with higher proportional rates to eastern destinations than shippers using the all-rail routes, if the relationship prescribed by the Commission goes into effect.

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prejudice, or disadvantage to the traffic of any other carrier of whatever description. Division 2 of the Commission expressed the view that the proviso would relieve the eastern railroads from liability under Section 3 (1) even though it were assumed that undue or unjust prejudice or disadvantage to ex-barge grain would result from the relationship sought to be established by the carriers (246 I. C. C. 363); but Commissioner Eastman pointed out that shippers were entitled to the protection of Section 3 (1) even though the operators of barge lines were not so protected. (248 I. C. C. 323.) However, it seems clear that the proviso was not intended to authorize discrimination against connecting rail and water lines, prohibited by Section 3 (4), which also was amended in 1940 so as to include water carriers within its protection or against shippers, who are protected by Section 2 as well as by Section 3 (1). The legislative history of the Transportation Act of 1940 shows that the proviso was first applied to Section 305 (c) of the Act (49 U. S. C. 905) and that the proviso was proposed in order to preclude a holding by the Commission that the rates of water carriers would constitute unjust discrimination, prejudice, or disadvantage to the traffic of competing carriers, or an unfair or destructive competitive practice within the meaning of Section 1 of the Transportation Act of 1940 (the National Transportation Policy), if such rates were lower than the rates of competing railroads (84 Cong. Rec. 6131, 9862–3). The bill passed the Senate in this form, but the proviso was revised in conference (86 Cong. Rec. 10166) and, as revised, was made applicable also to Section 3 (1) of the Act. Accordingly, the correct interpretation of the proviso is that Section 3 (1) shall not be deemed to have been violated merely because rail rates are higher than the rates of competing water carriers, and the proviso may not become a cover for discrimination against connecting water lines and shippers utilizing the barge-rail routes.

Since the relationship between ex-barge and ex-rail rates which the Commission prescribed was prohibited by the various provisions of the Interstate Commerce Act which have been discussed, the Commission's action assailed in the present suit was vitiated by errors of law and cannot be sustained upon judicial review.

III

THE COMMISSION'S CONCLUSIONS LACK A RATIONAL BASIS

As demonstrated in the foregoing discussion, the Commission's conclusions are vitiated by error of law and misapplication of the statutory standards prescribed by Congress. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. They also lack the requisite "rational basis." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146. The relationship between ex-barge and ex-rail rates which the Commission prescribed is obviously based upon irrelevant and immaterial findings made by the Commission, whereas no findings of fact which would be adequate to support the prescribed relationship are made in the Commission's report.

Protestants at a previous stage of the controversy regarding grain rates pitched their case upon erroneous claims that the Commission was bound to maintain the status quo by perpetuating the existing rate structure whatever might be its defects. *Interstate Commerce Commission* v.

Inland Waterways Corp., 319 U. S. 671, 684. This Court pointed out that they were not entitled to the "fortuitous" benefits of the existing rate structure, which involved numerous departures from the long and short-haul requirements of Section 4 of the Act. 319 U. S. at 687–8, 691.

The Commission in its report criticized the existing barge-rail combinations upon the ground that they constitute "numerous and extreme departures from the long-and-short-haul provisions of section 4 of the Interstate Commerce Act" (262 I. C. C. 20, R. 24). But the Commission's decision did not rest upon this construction of Section 4. It concluded that under Section 6 (b) of the Transportation Act of 1940, the eastern railroads were relieved from increasing their present proportional rates so as "to bring the barge-rail combinations in harmony with fourth-section principles" (262 I. C. C. 30, R. 34, 35) and that, accordingly, Section 6 (b) of the 1940 Act would also protect the departures of lesser extent that would result from the ex-barge proportional rates prescribed by the Commission. (262 I. C. C. 31, R. 35) Commissioner Alldredge in his dissent also expressed the view that Section 6 (b) of the Transportation Act of 1940 afforded relief from the operation of Section 4 (262 I. C. C. 36, R. 40).

No controversy as to Fourth Section departures is involved on the present appeal. No complaint has been made by shippers at intermediate points,

to protect whom Section 4 was designed. Moreover, the barge-rail rates, considered in and of themselves, comply with Fourth Section principles; and only in comparison with *all-rail* local rates, is there any disparity. Such disadvantage to intermediate inland points not having access to water transportation is due entirely to natural disadvantage of location, and constitutes no reason for depriving shippers more advantageously situated, of the protection afforded by the national transportation policy to the low rates by water transportation.

Furthermore, it has long been established that Fourth Section questions must be determined by comparison of the same kind of rates, and not by comparison of proportional rates with local rates, as here attempted. *Baltimore Chamber of Commerce* v. *Baltimore & Ohio Railroad Company*, 22 I. C. C. 596, 601–2.

On the prior appeal, this Court held that the water carriers and shippers of ex-barge grain were not entitled as a matter of law to application of the existing out-bound proportional rail rates on grain from Chicago to eastern destinations. (319 U. S. 683–4.) This holding was based on the manifest correctness of the proposition that the circumstances and conditions under which the ex-barge and ex-rail grain moved eastward might be entirely different. For example, conceivably it could be made to appear that the eastern railroads

sustain a heavier burden in transporting the ex-barge grain for performing which they would be entitled to receive greater compensation.

This Court rejected the theory that the Commission had approved or prescribed application of the local rates to ex-barge grain out-bound from Chicago. (319 U. S. 686–7.) The opinion stated that, "our decision carries no implication of approval of any rates here involved." (319 U. S. 691.)

Now the Commission has spoken. It has now condemned the use of the local rates which were permissible under the order sustained by this Court. The present case deals with an entirely different subject matter, which was expressly left open in this Court's opinion. (319 U. S. 686–7.) To employ the word repeatedly used in the Commission's report, it has "prescribed" proportional rates for application to ex-barge grain moving out-bound by rail from Chicago and a relationship between those rates and the proportional rates on ex-rail grain. The issue here is whether the Commission's action squares with the applicable law.

We do not here contend that the present ex-rail proportional rates are necessarily the proper rates for application to ex-barge grain traffic. Nor do we contend that ex-barge proportional rates must necessarily be identical with the proportional rates applicable to transportation of ex-rail or ex-lake grain. We recognize that from a theoretical standpoint circumstances might con-

ceivably exist where differences in transportation conditions might warrant a difference in rates. Our contention is that the Commission's findings in this proceeding fail to provide a rational basis for establishing higher proportional rates on ex-barge grain received at Chicago from points on the inland waterways system than the contemporaneous proportional rates on ex-rail grain received at Chicago from the same points on the inland waterways system.

In other words, the real question for determination by the Commission was whether transportation conditions and circumstances involved in the movement of ex-barge grain from Chicago eastward were different from the circumstances and conditions pertaining to the movement of ex-rail grain shipped from that point. In the absence of findings, supported by substantial evidence, disclosing substantial difference between those transportation conditions and circumstances, the relationship prescribed by the Commission is plainly prohibited by law and cannot be justified.

The Commission has failed to make findings with respect to the traffic in controversy, that is to say, traffic from the area where the barge-rail and all-rail routes are competitive.[46] This means the

[46] Division 2 of the Commission defined this competitive area in Illinois. (246 I. C. C. 355–356.) "This corn producing section lies west and southwest of Chicago and is bounded on the north by Herbert and Oregon, Ill.; on the west by Prophetstown and Neponset, Ill.; on the southwest by Cazenovia, Ill.; on the south by Ocoya, Danforth and Pittwood,

area adjacent to the waterways which is now served by both water and rail carriers.

This controversy had its genesis in the effects which flowed from the substantially equal treatment in out-bound proportional rail rates from Chicago accorded ex-barge and ex-rail grain shipped to Chicago from points on or near the waterways where the in-bound water and rail services were competitive. The water rates, which the Commission has found were just and reasonable (262 I. C. C. 19, R. 23), combined with the outbound proportional rail rates resulted in lower through rates to eastern destinations than the combinations made up of the in-bound and outbound proportional rail rates from points served by the in-bound water carriers.

As a result of this advantage in rates, the water carriers captured from the inbound rail lines a substantial portion of the grain traffic; and the farmers served by the barge lines received greater net prices for grain. To assist the inbound railroads in their efforts to recapture

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Ill., and on the east by Schneider and North Hayden, Ind. * * * Much of the 65,774,000 bushels of corn received in Chicago in 1939 by rail, and all of the 13,206,000 bushels received over the Illinois Waterways, originated in this section." As this Court said in *Florida* v. *United States*, 282 U. S. 194, 212, "it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic * * *". See also *United States* v. *C., M., St. P. & P. R. Co.*, 294 U. S. 499, 506; *North Carolina* v. *United States*, 325 U. S. 507, 520.

this traffic, the eastern railroads attempted to apply the local rates to ex-barge grain outbound from Chicago in lieu of the much lower proportional rates. After further hearing the Commission has condemned this attempt as unlawful because it would destroy the barge-rail traffic. (262 I. C. C. 25, R. 29)

It is clear that the effects of this equal treatment in proportional rates accorded ex-barge and ex-rail grain did not extend beyond the area where the inbound water and rail lines competed for traffic. Although the barge lines made substantial inroads upon the inbound traffic of the railroads serving this area, the water carriers could not compete for traffic with railroads serving only inland points, not accessible to the waterways. Accordingly, the volume of rail traffic from the inland points was not curtailed by the equal treatment given ex-barge and ex-rail grain outbound from Chicago.

Likewise, the equal treatment in proportional rates accorded ex-barge and ex-rail grain outbound from Chicago affected only the net prices received by the farmers and shippers in the area served by the competing inbound water and rail lines. All grain of like kind and grade comes to a common market value at Chicago, regardless of the cost, mode or length of inbound transportation (Fdg. 10, R. 180), and the net prices received by the farmers are determined by deducting from the Chicago price the inbound trucking costs,

freight charges, country elevator margins and other costs and margins peculiar to the inbound mode of transportation utilized by the shipper. (262 I. C. C. 16, 23; R. 20, 27.) Accordingly, the farmers and shippers received greater net prices for grain where the cheaper water service was used to move grain to Chicago. Hence, other costs being equal, any difference between the net prices received by the farmers and shippers served by both water and rail, on the one hand, and those served only by railroad, on the other, was caused by the difference between the inbound water and rail rates, not by the equality in the outbound proportional rates.[47]

Similarly, the effects which would result from the prescribed difference in outbound proportional rates would not extend beyond this competitive area. The volume of grain traffic from this area handled by the inbound water carriers would be curtailed by the higher charges over the barge-rail routes while the volume of grain transported by the inbound rail lines which compete with the barge carriers would be increased; for farmers and shippers would utilize the rail service where the rate advantage of using the barge-rail rates

[47] It may be suggested that the low inbound water rates have increased the quantity of grain received at the market place. Such an increase conceivably could have depressed the common price paid for grain of like kind and grade. But the Commission has not found that any grain moved to Chicago which, except for the low rates, would have been shipped to other markets.

would be overcome by the trucking costs involved in moving grain to the waterways. The volume of grain transported inbound by the railroads from inland points, not accessible to the waterways, would not be changed by the unequal treatment here proposed, for the water carriers cannot compete for this traffic where the outbound rates are equal, and the unequal treatment would only increase this barrier.

The net prices received by farmers and shippers at inland points, served only by railroad, would not be changed, for their outbound rates would not be altered under the Commission's proposal. But the net prices received by the farmers and shippers served by the water carriers would be reduced, for the barge-rail rates would be increased.

Accordingly, determination of whether the prescribed difference in outbound proportional rates would violate Sections 2, 3 (1) or 3 (4) required that the Commission make findings with respect to the traffic shipped to Chicago from the area where the difference in rates would produce changes in the volume of traffic transported by the competing inbound water and rail lines and in the prices received by the farmers and shippers utilizing their facilities. Plainly, a difference in rates can be discriminatory only where it produces injury and, where it produces injury, the different treatment can be justified only by showing that a greater burden is sustained in

transporting the traffic charged the higher rate.

Section 3 (4), which unqualifiedly prohibits discrimination between connecting lines, is clearly designed to protect competing carriers in their struggle for traffic. Injury to connecting carriers from the difference in proportional rates herein prescribed could occur only where the inbound water and rail lines compete for traffic. Hence, with respect to such competitive traffic, Section 3 (4) would prohibit the difference in rates unless it is determined that the eastern railroads assume a greater burden in transporting ex-barge grain than they bear in hauling ex-rail grain shipped to Chicago from this competitive area. "Plainly by these provisions the only difference which carriers can make in the treatment of their connections is such as can be justified by differences in the conditions and circumstances surrounding the service rendered." *Chattanooga Packet Co.* v. *Illinois Central R. Co.*, 33 I. C. C. 384, 391.

The findings made by the Commission are not adequate to support its ultimate decision because they do not deal with this vital, competitive area. After pointing out that proportional rates are in their essence balances of through rates and properly may vary according to the relative length and nature of the inbound and through service, the Commission said:

> Where, as here, ex-rail and ex-lake proportionals or specifics reflect average cir-

> cumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences. (262 I. C. C. at 27, R. 31, 32.)

Assuming that different rates on ex-barge grain, on the one hand, and ex-rail and ex-lake grain, on the other, may be predicated upon a difference in average circumstances and conditions,[48] it would be true that a relationship recognizing a difference in rates might properly have been prescribed if the Commission had made a valid finding, supported by substantial evidence, disclosing the difference, if any, in transportation conditions and circumstances between the transportation of ex-barge grain and the transportation of ex-rail grain moving from Chicago to the same eastern destinations.[49]

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[48] In *North Carolina* v. *United States*, 325 U. S. 507, 515, this Court stated that carriers must be treated on an individual basis for rate-making purposes, from which it follows that findings with respect to discrimination cannot be based upon proof of average circumstances and conditions.

[49] It is well established that this Court will not make the required determination. "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body". *Florida* v. *United States*, 282 U. S. 194, 215.

But, as heretofore shown, the Commission made no such finding. The findings upon which the Commission relies[50] deal with irrelevant facts regarding the length and nature of inbound rail hauls on traffic originating at points not having access to transportation via the inland waterways system. Only the area where water carriers utilizing the inland waterways system compete with all-rail routes is pertinent in considering

[50] 262 I. C. C. 28, R. 32. The findings made by the Commission read as follows:

1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory.

2. The in-bound rail hauls of all of the traffic which engages the ex-rail proportionals are substantially longer, on the average, than the in-bound barge hauls.

3. The rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic here considered include:

(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of the gateways an average outbound factor which is a component part of many through rates of different amounts, which vary with the length of the in-bound hauls and the western factors applicable thereto.

(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the in-bound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways.

the question whether substantial differences in transportation conditions and circumstances exist between the ex-barge and ex-rail traffic.

The existing ex-rail proportional rates for transportation east of Chicago apply uniformly to grain originating at numerous points throughout a vast territory without regard to either the relative lengths of the inbound hauls or the other circumstances and conditions peculiar to the inbound movements. It may well be that this uniformity is a defect in the existing rate structure, and that the all-rail rates from points within the area competitive with water transportation are not properly related to the all-rail rates from non-competitive points in other parts of the territory whose traffic now moves under the ex-rail proportionals. But the pertinent question with respect to the proper rela-

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(c) The ex-rail proportionals or specifics, combined with the in-bound interstate rates or specifics, result in through all-rail rates to official territory which harmonize with each other and with the local rates in that territory.

4. Lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul in-bound and is usually preceded by an in-bound rail haul. The rail-lake-rail combinations, in general, conform to the principles which underlie section 4. In these respects lake grain is like barge grain from Kansas City but unlike barge grain from Illinois. To trunk-line and New England territories, the lake-rail grain differs from all of the barge-rail grain moving through Chicago in that the lake-rail grain can and generally does by-pass that gateway entirely.

tionship between ex-barge and ex-rail grain is whether substantial differences exist in transportation conditions and circumstances between the barge-rail routes and the all-rail routes from the same points of origin lying within the area where *rail and water transportation are competitive.*

Since the water carriers do not compete for grain traffic shipped from points west of Chicago not accessible to the inland waterways system, the level of rail rates from such points has no bearing whatever upon the relationship between rates outbound from Chicago on ex-barge grain and ex-rail grain shipped from identical origins on the waterways. As all grain of like kind and grade comes to a common market value at Chicago, regardless of the cost, mode or length of inbound transportation,[51] the level of the barge rates on grain has no effect upon the prices paid to inland producers not located within the area where rail and water transportation are competitive. Thus the rail rates from such inland points to Chicago were immaterial to the issue in the proceeding before the Commission.

Likewise, the water carriers do not compete for the transportation of grain shipped from points east of Chicago not accessible to the inland waterways system. This grain usually moves to eastern markets, where it must compete with grains from

[51] Finding 10, R. 180.

Chicago. But even where a farmer ships grain from points east of Chicago by rail to Chicago, he must absorb all handling charges from the prices there received. Accordingly, neither the level of the rail rates from points east of Chicago to Chicago nor the rail rates from such points to more eastward points are material to the determination of whether the relationship between ex-barge and ex-rail proportional rates prescribed by the Commission is discriminatory.

Even if it be true, as the Commission found, that:

> On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory. (262 I. C. C. at 28, R. 32.)

this finding may not be lawfully utilized to support the relationship prescribed by the Commission, since it embraced inbound rail movements from points not served by the water carriers. The Commission made no finding whether ex-barge grain required more or less service than ex-rail grain shipped from the same points on the inland waterways system.

Moreover, even if it be assumed that different outbound rates can be predicated on findings of

"average" differences, as here attempted, the Commission failed to find the extent to which the eastern railroads perform less terminal service at Chicago on ex-rail grain than on ex-barge grain. Hence, it is impossible to determine whether any additional service performed justifies the higher rates prescribed for ex-barge grain. Moreover, the insubstantial character of this finding as a basis for higher charges on the ex-barge traffic is shown by the fact that the outbound proportional rates apply to ex-rail grain without regard to whether the all-rail traffic moves directly through Chicago, in which event no terminal service is performed, or whether it stops at that point for marketing or processing, in which event the eastern railroads perform the same terminal service on ex-rail grain as on ex-barge grain. (262 I. C. C. 14, R. 18.) In the case of all-rail traffic, the Commission permitted application of the same outbound proportional rates, regardless of the amount of terminal service performed.

Unlike its finding with respect to the transit privileges included with the inbound rates (262 I. C. C. 14, R. 18), the Commission failed to find that the outbound rates included any transit privilege. Accordingly, the significance of this finding with respect to transit is not apparent, for carriers usually exact an additional charge for performing transit service. See *Central Railroad Company of New Jersey* v. *United States*, 257

U. S. 247. In this event it makes no difference whether more transit is accorded on ex-barge grain than on ex-rail or ex-lake grain, for the additional transit charge fully compensates the carrier and whether there is a difference between the transit accorded on ex-barge and ex-rail traffic has no bearing upon the level of the line-haul rates.

It may well also be a fact that:

> The in-bound rail hauls of all of the traffic which engages the ex-rail proportionals are substantially longer, on the average, than the in-bound barge hauls. (262 I. C. C. at 28, R. 32.)

Utilization of this average fails to disclose the lengths of the inbound barge and rail hauls from points on the inland waterways system. It is apparent, however, that the inbound barge and rail hauls from the same point on the inland waterways system to Chicago would automatically, as a rule, be substantially equal in length for rate-making purposes.[52]

Moreover, the arbitrary nature of this finding as a basis for higher charges on ex-barge grain is

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[52] The general rule of rate-making is that rates are relatively lower for longer distances. The Commission found (262 I. C. C. 21, R. 25) that "In-bound to Chicago, as compared with the direct rail-hauls, the barge-hauls are slightly longer from the Illinois origins and substantially longer from Kansas City." But the Commission did not regard the difference in distances from Kansas City and Illinois origins as significant, and prescribed a uniform proportional rate for all ex-barge traffic. (262 I. C. C. 31, R. 35.)

shown by the fact that the outbound proportional rail rates apply to ex-rail grain "so far as practicable at a uniform figure regardless of origin" (262 I. C. C. 17, 38–9; R. 21, 43).

Similarly the other findings made by the Commission with respect to the "rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic" (262 I. C. C. at 28, R. 32), deal with factors which may properly affect the level of ex-rail proportional rates from Chicago to eastern destinations, but which have no pertinence as a justification of proportional rail rates on ex-barge grain higher than the rates on ex-rail moving from the same points on the inland waterways system.

None of the findings made by the Commission does more than give rise to a possible inference that the present ex-rail proportional rates may not be proper rates for application to ex-barge traffic. The findings do not in any respect show that a discriminatory relationship between ex-barge rates and ex-rail rates on grain shipped from the same points within the area where water and rail transportation are competitive would be justified as reasonable or otherwise lawful. As Commissioner Alldredge makes plain in his dissent, there is no logical relation between cause and effect in the Commission's decision. Commissioner Alldredge said:

> This proceeding was started by action of the eastern rail lines in an attempt to restrict their tariffs so that the east-bound

proportional rates published therein on grain and grain products from Chicago would not in the future apply on such traffic when it originates along the Illinois Waterway and is brought into Chicago by barge or boat. The railroads acted in this matter entirely in their own interest. There was no shipper demand, so far as the record discloses, for any change in the proportional rates applicable on this ex-river traffic. The boat and barge competition on the Illinois Waterway, however, is the exclusive concern of the western rail lines terminating in Chicago. They are the only railroads that are competitive with boats and barges operating on this waterway. The railroads running east of Chicago, insofar as the movement of this particular traffic to its ultimate market is concerned, offer a supplementary service to the water lines as well as to the western railroads. They obtain the same rates and revenues irrespective of whether these commodities are delivered to them at Chicago by the western railroads or by boats and barges on the Illinois Waterway. If any railroads, therefore, are actually suffering from the competition of the boats and barges on this waterway, it is the western and not the eastern railroads. Any need for revising the existing rates in issue here, if any such need exists, would spring from this one particular circumstance. In endeavoring to compose this situation, however, under

the principles announced by the Supreme Court of the United States in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, the majority has decided to increase the rates and revenues of the rail lines extending east from Chicago, even as far as New England—a wholly different set of carriers from those which feel the effects of the waterway competition. There is, therefore, no logical relation between cause and effect in the majority decision. The only real solution of the problem, if any solution is called for, is to establish minimum rates for the boats and barges operating on the Illinois Waterway so as to protect the western rail lines against the competition thus created. These western railroads, however, have not made out such a case on this record. The boat lines are apparently prospering under the rates which they are now charging, and there seems to be no reason for putting a floor under those rates. (262 I. C. C. 34–5, R. 38–39).

The arbitrary character of the relationship prescribed by the Commission between ex-barge and ex-rail rates is further demonstrated by the fact that the standards here used to justify higher rates on ex-barge grain could with equal force be used to justify different rates on ex-rail grain transported to Chicago by competing railroads from the same points west of Chicago.

In fact, the Commission's report shows that where the outbound proportional rates to points

east of Chicago vary [33] according to the points west of Chicago from which grain is shipped to Chicago, the eastern railroads accord equal treatment to inbound rail lines which compete for traffic, in strict conformity with Section 3 (4). (Appendix A, Table II, 262 I. C. C. 39, R. 43.) Unequal treatment of competing connecting rail carriers plainly would be unlawful and discriminatory under Section 3 (4). Indeed the Commission itself in many cases [34] has expressed its understanding of the issues involved in the present proceeding in forceful language applicable here.

Reduced to its essence, the Commission's finding in this proceeding that the existing relationship

[33] Such variance in the outbound proportional all-rail rates is perhaps contrary to Sections 2 and 3 (1) of the Act. However, it is possible that this difference in rates could be justified under Sections 2 and 3 (1) as between all-rail shippers, for under those provisions of the Act, a difference in rates is unlawful only where it is "unjust," "undue," or "unreasonable." Assuming that this difference in rates is lawful on the all-rail traffic under Sections 2 and 3 (1), it does not follow that the Commission has the power to determine that the prescribed relationship in rates would not be discriminatory between the barge-rail and all-rail shippers under Sections 2 and 3 (1), for the national transportation policy provides that the Interstate Commerce Act "shall be administered and enforced" so as to recognize and preserve the inherent advantages of each mode of transportation which, as to water carriers, means their low rates. Accordingly, the Commission's power to determine whether the prescribed difference in rates would be "unjust," "undue," or "unreasonable" must be deemed to have been curtailed by adoption of the policy.

[34] Cited in 262 I. C. C. at 26, R. 30.

of equality between barge-rail and all-rail rates is an "inequitable situation" really means nothing more than that it is inequitable for farmers located on or near the waterways to receive greater net prices for their grain than do farmers at inland points who do not enjoy the inherent advantage of low cost water transportation. Congress, in directing the Commission to preserve the inherent advantages of water transportation, has taken a contrary view.

A fatal defect in the conclusions and findings of the Commission is that they disclose an attempt by it to accommodate the lower barge factors of the barge-rail rates to the existing all-rail rate structure so that the lower barge factors will not disrupt the all-rail rate structure on grain. Here the Commission fell into error. It encountered not only the positive prohibitions of the Interstate Commerce Act but also a mandate from Congress to adjust rate structures so that the lower rates of the water carriers, an inherent advantage of water transportation, will be fully reflected in all cases.

A heavy overtone of concern over the disruptive effect of the lower water rates upon the rail grain rate structure runs through the Commission's report. To protect that structure, it chooses to accommodate the water rates to the rail structure so as to bring the water-rail charges in substantial equality with the all-rail rates.

Although appellees do not contend that ex-barge grain is entitled as a matter of law to the benefits of the outbound rail rates, the Commission seizes upon this Court's statement that the water carriers and shippers over the water-rail routes are not entitled to the "fortuitous * * * benefits of the existing rate structure" in support of the prescribed relationship in outbound rates.

But in so doing the Commission has ignored the equally "fortuitous" fact that in certain localities natural waterways are available for barge transportation, the inherent advantages of which under the law, must be fostered and protected. It has disregarded the fact that the water competition extends only to the rail lines which directly compete with the water carriers and that only the rates of the competing inbound water and rail lines need be adjusted in order to accommodate this competition to the rate structure.

Assuming, as the Commission found, that the inbound barge rates are just and reasonable, the proper remedy, if one is needed, is to leave the railroads free, subject only to the restrictions imposed upon them by the Act, to meet the competition of the water carriers by reducing their own rates. Adoption of such a procedure would carry out fully the congressional mandate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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JANUARY 1947.

APPENDIX

The pertinent provisions of the Interstate Commerce Act are as follows:

[Applicable to all parts]

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Section 1, Act of September 18, 1940, c. 722, 54

Stat. 898, 899; 49 U. S. C., notes preceding §§ 1, 301 and 901.)

Section 1, Paragraph (5) (a) of Part I of the Interstate Commerce Act:

> (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a)).

Section 2 of Part I of the Interstate Commerce Act:

> Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transporfation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 3, Paragraph (1) of Part I of the Interstate Commerce Act:

> (1) It shall be unlawful for any common carrier subject to the provisions of this part

to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. (49 U. S. C. 3 (1))

Section 3, Paragraph (4) of Part I of the Interstate Commerce Act:

(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3 (4))

U. S. GOVERNMENT PRINTING OFFICE, 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 72

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

A. L. MECHLING, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF APPELLEE, INLAND WATERWAYS CORPORATION.

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January 4, 1947.

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BRIEF ON BEHALF OF APPELLEE, INLAND WATERWAYS CORPORATION.

Opinions below

The specially constituted District Court rendered no written opinion. Its findings of fact and conclusions of law are not reported, but are set forth in the printed record. (R. 177) The report and order of the Interstate Commerce Commission which were set aside and enjoined by the court below are reported in 262 I. C. C. 7. Prior reports in that proceeding, known as *Investigation*

and Suspension Docket No. 4718 Grain Proportionals, Ex-Barge to Official Territory, appear in 246 I. C. C. 353, and 248 I. C. C. 307.

Jurisdiction

The final decree of the District Court was entered on November 26, 1945. (R. 207) Petition for appeal was filed (R. 209) and allowed on January 24, 1946. (R. 214) Probable jurisdiction was noted April 29, 1946. (R. 228) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, 32, 38 Stat. 208, 219, 220 (Title 28, U. S. C., Secs. 47 and 47a) and Section 28 of the Judicial Code as amended. (Title 28, U. S. C., Sec. 345).

Statutes

The provisions of Section 3(4) of the Interstate Commerce Act are relied upon herein and are reproduced in Appendix A, together with certain other important sections, of the statutes.

Statement

EXPLANATION OF TERMS

For clarity, we define the following terms used herein:

Ex-barge grain means grain that is transported to Chicago by the barge-line appellees over the inland waterways and is reshipped from Chicago via rail, either immediately or after a period of storage. *Ex-rail grain* or *ex-lake grain* means grain that arrives at Chicago via railroad or lake steamer, respectively, and is similarly reshipped therefrom.

Proportional or *reshipping rates* are separately established rates which, by their terms, apply only to grain that

has received a prior transportation service of the particular character specified in the tariffs naming such rates. The term *ex-barge rate*, or *ex-rail* or *ex-lake rate* means a proportional or reshipping rate that applies to grain transported to the reshipping point via specified mode of inbound transportation. Some proportional rates are restricted to grain from a defined origin territory. Such rates are qualified by terms indicating the designated territory, as for example, "Trans-Mississippi" (or "TM") and "Northwest." *Local rates* are those that apply when the traffic has had no prior haul or when the prior haul does not meet the conditions specified for the application of proportional rates.

Official territory is the territory east of Chicago and north of the Ohio and Potomac rivers. It includes *central territory*, which lies between Chicago and the Buffalo-Pittsburgh line, and *eastern trunk-line* and *New England territories*, east thereof.

We refer to the Interstate Commerce Commission as the *Commission*. Citations herein of the *Act* or specific sections of the *Act* refer to the Interstate Commerce Act, as amended. (Title 49, U. S. C.).

TRAFFIC AND RATES OF THIS APPELLEE AND ITS COMPETITORS

The traffic with which this appellee is particularly concerned is wheat and other grain that it transports from Kansas City, Mo.-Kans., to Chicago for rail reshipment beyond. That traffic pays to Chicago 9.5 cents [1] via barge and 16 cents via the lines of competing rail carriers. (Rep. 19, 39, 40; [2] R. 23, 45, 46) The Commission found

[1] Rates are stated in cents per hundred pounds.

[2] References in this form are to pages of the Commission's report in this case, as reported in 262 I. C. C. 7. In each instance reference is also shown to the corresponding page of the record where the report is printed.

that the barge rate yields a fair return to the appellee and is reasonable. (Rep. 19; R. 23) The rail rate was prescribed as reasonable in the *Grain & Grain Products case*, 205 I. C. C. 301, 215 I. C. C. 83. The difference of 6.5 cents is partially offset by the charges incurred in transferring the ex-barge grain at Chicago. Those charges amount to 3.25 cents.[3] In addition, barge shipments from rail elevators at Kansas City must bear switching charges of $6.93 or $8.91 per car, and a transfer charge of 39 cents per ton. There is only one river elevator at Kansas City. (Rep. 23; R. 27)

Wheat and other grains also come to Chicago via lake for reshipment via eastern railroads. From Duluth, Minn., for a water haul of 808 miles, the steamer charge is about 5 cents. (Rep. 18; R. 21) The 9.5-cent barge rate from Kansas City to Chicago applies to a water haul of 722 mile. (Rep. 40; R. 46)

At present, ex-rail grain and ex-barge grain originating at Kansas City pay precisely the same reshipping rate to all destinations east of Chicago. To eastern trunk-line and New England territories, the ex-lake grain from Duluth also pays that same rate. To those territories, the reshipping rate is the same on all grain having a prior haul to Chicago whether via water or rail and from *any* origin territory. (Rep. 12; R. 16)

To central territory, the reshipping rates on grain from Duluth are the same for ex-lake and ex-rail grain. (Rep. 18; R. 21) They are called Northwest proportionals and are generally higher than the Trans-Mississippi proportionals from Kansas City. (Rep. 13; R. 16) Both ex-barge grain and ex-rail grain from Kansas City take the Trans-Mississippi basis. (Rep. 20; R. 24)

[3] These charges are not for railroad services but are for trimming, weighing and inspection at time of transfer from barges to cars through a water-front elevator. (Rep. 23; R. 27)

The Commission found that the rates to trunk-line and New England territories are by far the most important in this proceeding, as marketers and processors in central territory can and do transit under such rates. (Rep. 15; R. 18) The present proportional rate on ex-rail, ex-barge, and ex-lake grain from Chicago to New York is 26 cents and the local rate is 34.5 cents. (Rep. 39; R. 43)

THE PRIOR PROCEEDING

The proceedings before the Commission were instituted in 1939 under Section 15(7)[1] (248 I. C. C. 307). The eastern lines then proposed to restrict all reshipping rates so as to be inapplicable to the reshipment of any grain which moved to Chicago via the Illinois Waterways. The eastern lines explained that proposal as designed to "drive this business off the water and back on to the rails where it belongs." (248 I. C. C. 307, 321) Hearings were held in 1939 and early 1940, prior to the amendment of Section 3(4), which now prohibits discrimination by a common carrier by railroad against a common carrier by water. In its report the Commission held that the proposed schedules were just and reasonable and not otherwise unlawful. (Rep. 8; R. 11-12) That order was set aside in *Cargill, Inc.* v. *United States* (1942), 44 Fed. Supp. 368, but on appeal the decree of the District Court was reversed. (*Interstate Commerce Commission* v. *Inland Waterways Corp.* (1943), 319 U. S. 671.)

THE PRESENT PROCEEDINGS

Thereafter, the Commission reopened the proceeding for further hearing on the question as to what would be

[1] All sections of the statutes referred to herein are to the Interstate Commerce Act as amended unless otherwise indicated.

reasonable and otherwise lawful proportional or reshipping rates for application to ex-barge grain. (Rep. 9; R. 12)

In its report and order on further hearing (the report was made a part of the order by the terms thereof, R. 49), the Commission prescribed and approved ex-barge rates from Chicago certain amounts less than the corresponding local rates. To New York, as a representative destination, the ex-barge rate was made 5.5 cents lower than the local rate of 34.5 cents, or 29 cents. The Commission expressly held that such a rate would be lawful under Sections 1, 2, 3(1), 3(4), 6(11)(b), and 15a(2) of the Act, administered with a view to carrying out the National Transportation Policy. (Rep. 32; R. 36-37) The existing ex-rail and ex-lake rates of 26 cents from Chicago to New York were not disturbed. They are 8.5 cents under the local rate. This means that the prescribed and approved ex-barge rate to New York is 3 cents higher than the corresponding ex-rail and ex-lake rate.[5]

The Commission found that rate relation to be lawful under the above sections of the Act. In its own words,

[5]On brief appellant refers to the prescribed differences between the local rates and ex-barge rates as "differentials". (Br. p. 48) That is a misnomer. "Differential" means a difference in rates on like traffic between the same points via one route as compared with another. (See cases cited on page 30 of the Commission's report. (R. 34)) The eastern rate factors as well as the local rate apply over the same route. The difference between the inbound rate by barge and the inbound rate by rail is correctly termed a "differential". If combination barge, rail through rates were in issue under Section 3 (4), which they are not, the difference between those rates and the corresponding all-rail rates would properly be called "differentials". The word "differential" can not properly be applied to the 3-cent rate disparity prescribed and approved by the Commission. The lower court termed that disparity a "rate penalty". (R. 185)

the Commission found the ex-barge rates would be lawful so long as:

> . . . no less favorable to the ex-barge traffic and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other. (Rep. 32; R. 36)

The Commission specifically found that the application of the local rates on ex-barge grain, as proposed, would destroy the traffic. That proposal was condemned and the suspended tariffs were ordered cancelled. (Rep. 25, 32; R. 29, 49)

THE BASIS ADOPTED BY THE COMMISSION FOR ITS ORDER

The Commission concluded that the eastern railroads could lawfully discriminate in their rates between connecting barge lines and connecting rail lines to the extent permitted by its order. It based that conclusion upon a finding that the average circumstances and conditions affecting outbound and through transportation in connection with inbound rail and lake movements were different from those in connection with inbound barge movements. (Rep. 27; R. 31)

In its report the Commission undertook to specify the average differences in transportation conditions on which it predicated its ultimate prescription of ex-barge rates 3 cents higher than corresponding ex-rail and ex-lake rates. (Rep. 27, 28; R. 32) Those specifications and the related findings may be summarized as follows:[8]

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[8] References to page 28 of 262 I. C. C., and to page 32 of the printed record indicate the findings found in the final summary of the Commission's specifications. Reference to other pages of 262 I. C. C., or to other pages of the printed record indicate other findings as to the same matters.

1. The Commission found that in three respects the *average* service performed by the eastern railroads was less in connection with rail and lake carriers than in connection with barge lines,-i. e., (a) less terminal service at the gateway or junction, (b) less transit service at intermediate points in the East, and (c) less line-haul service to the southern portion of central territory. (Rep. 28; R. 32)

(a) The difference in average terminal service occurs because some ex-rail grain moves through Chicago in continuous service, so as to require only an interchange service between rail lines rather than a full origin terminal service, whereas the ex-barge grain always starts its rail journey at that point. (Rep. 21; R. 25) The Commission found that the ex-rail proportionals apply, and will continue to apply, whether the rail traffic is handled in continuous service or stopped at the gateways or other intermediate points. (Rep. 14, 17; R. 18, 21) It also found that transfer of lading and full origin terminal service are always required at the interchange port in connection with lake carriers. (Rep. 18, 25; R. 22, 25)

(b) The difference in *average* transit service occurs because some ex-rail grain is processed on all-rail routes west of Chicago, and consequently moves east of Chicago as grain products, whereas all of the ex-barge grain is processed east of Chicago and moves from Chicago as whole grain. (Rep 22; R. 26) The Commission did not mention the further, undisputed fact that a special transit charge is paid for any transit privilege accorded east of Chicago. (R. 199; Fdg. 28(i), note 37(a)) It did find that the ex-rail rates apply, and will continue to apply, whether or not the ex-rail traffic receives transit east of Chicago. (Rep. 14, 17; R. 18, 21) Ex-lake grain was found to be like ex-barge grain in that it is processed east of Chicago,

principally in Central Territory, and the products thereof move on to eastern, trunkline and New England territories under a transit arrangement. (Rep. 18; R. 22)

(c) The difference in average outbound line-haul service is due to the fact that some rail grain originates at points south and east of the Chicago-Peoria-Ft. Madison, Iowa, line (outside the territory served by barge). In instances when that rail traffic does not move through Chicago, but moves over direct routes south thereof, the through distance is less than via Chicago. All of the barge traffic must move through Chicago. (Rep. 21; R. 25) The Commission further found that the eastern railroads do interchange at Chicago with connecting rail lines bringing grain from southern Illinois origins without difference in rate treatment.[7] (Rep. 13; R. 17) The Commission made no finding of any difference in rail haul to southern central territory, ex-barge vs. ex-lake grain. The grain in both categories is reshipped from the same reshipping point.

The Commission did not order that the application of the ex-rail and ex-lake rates be made contingent upon the amount of terminal service, transit service, or line-haul service to southern central territory received by such ex-rail and ex-lake grain. It did not order any rate higher than the usual ex-rail rate for that portion of the ex-lake and ex-rail traffic which receives the identical transit service, identical terminal service, and identical line-haul service to southern central territory as is received by ex-barge grain for which the higher basis was prescribed. (R. 197, 198; Fdg. 28(b) (c))

2. The Commission found that the inbound rail hauls

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[7] On page 40 of brief, appellant states as to the *ex-rail* adjustment, "The demand has always been for the application of the through rates by way of Chicago even though the direct route would not pass through Chicago."

to Chicago are longer *on the average* than the inbound barge hauls. (Rep. 28; R. 32)

The Commission also found as to the traffic of this appellee from Kansas City that the inbound hauls are relatively long (Rep. 21; R. 24-25) and that the barge hauls are preceded by rail hauls to Kansas City. (Rep. 21; R. 24)

It also found that the ex-lake grain enjoys the same proportional or reshipping rate as is provided on ex-rail grain. (Rep. 18; R. 21) The water haul from Duluth is 808 miles (Rep. 18; R. 21); the barge haul is 722 miles from Kansas City. (Rep. 40; R. 46)

3. The Commission found that the proportional rates which the eastern railroads maintain for their connecting rail lines are a component part of many through rates of different amounts and represent *an average* of varying balances of through rates from long- and short-haul origins. (Rep. 28; R. 32) The Commission did not find that the open proportional which is always used, not only now but at all times in the past, in constructing combination through rates from origins west of the Mississippi River had been arrived at by such process. The history of that proportional (Rep. 14, R. 17) carries not even a suggestion of a relation between the measure thereof and the balances of through rates from origins west of the Mississippi River.

In this connection the Commission also found that the inbound rates of the connecting rail lines had been prescribed by it,[8] (Rep. 12; R. 15) and that the inbound rates

[8]On pages 36 and 38 of brief, appellant uses language which implies that the inbound rates via rail to Chicago were prescribed as components of through rates to eastern trunk-line and New England territories. The fact is that the inbound rates were prescribed for local application to Chicago (not contingent on

of the connecting barge lines yield fair returns and are reasonable. (Rep. 19; R. 23). It found that the proportional rates from Chicago to trunk-line and New England territories are by far the most important in this proceeding, and they are uniform on all ex-lake and ex-rail grain regardless of origin or length of inbound hauls. (Rep. 12, 15; R. 16, 18) It further found that the ex-rail traffic consists of all kinds of grain moving for all distances, long and short, over both direct and circuitous routes. (Rep. 17; R. 21)

4. The Commission found that the rates which the eastern carriers provide for their connecting rail lines are subject to a fourth-section rule, which provides that to trunk-line and New England territories those rates shall apply only when the inbound rate is 8.5 cents or higher. (Rep. 28; R. 32)

In this connection the Commission noted that Section 6(b) of the Transportation Act of 1940 (54 Stat. 904) authorizes the eastern railroads to maintain their present rates on ex-barge traffic even when the barge-rail combination is less than the local rail rate from the reshipping point. (Rep. 30; R. 34-35) It concluded that the rule mentioned should not be made applicable in connection with ex-barge proportionals. (Rep. 32; R. 37)

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movement beyond). In an early report in the *Western Grain* case, 173 I. C. C. 511, 530, the Commission said that Chicago, Peoria, St. Louis, etc., "are to be considered as final terminal destinations, where the shipment under transit ends". The eastern factor to New York was not in issue in the proceeding in which the Commission prescribed rates via rail to Chicago and the Commission was without authority to treat with or consider the combination through rate in that case. That eastern factor is purely a voluntary rate and the lawfulness of the measure thereof has never been passed upon by the Commission in any proceeding; and particularly has never been considered by the Commission in any case from the standpoint of the through rates from the West to the East made by the use thereof.

As to this appellee, the Commission found that no fourth-section situation exists in connection with the present barge-rail rates from Kansas City since the inbound barge rate therefrom to Chicago is 9.5 cents. (Rep. 21; R. 24)

5. The Commission found that the rates provided by the eastern railroads for their connecting rail lines equalize the all-rail rates by various routes and gateways.[9] (Rep. 28; R. 32) It also found that these rates result in through all-rail rates which harmonize with each other and with the local rates in that territory. (Rep. 28; R. 32)

In this connection the Commission found that the Peoria and St. Louis gateways would be entitled upon reasonable request to ex-barge proportionals properly aligned with those approved from Chicago, but that the record did not contain sufficient detail for the prescription thereof in this proceeding. (Rep. 32; R. 36) The Commission made no finding as to whether the through barge-rail rates, either under the present or prescribed ex-barge proportionals, would or would not equalize gateways or harmonize with local rates.

6. The Commission summarized the pricipal differences found by it to warrant ex-barge proportionals higher than ex-lake, as follows (Rep. 28; R. 32): (a) lake grain is chiefly wheat; (b) it has a relatively long haul inbound and is usually preceded by an inbound rail haul; (c) the combination of rail-lake-rail factors conform to the principles which underlie Section 4; and (d) the lake-rail grain can, and generally does, by-pass the Chicago gateway entirely.

In connection with the first three principal differences

[9]Chicago, St. Louis and Peoria are the principal gateways on grain traffic from the West to the East, *Grain and Grain Products*, 205 I. C. C. 301; 215 I. C. C. 83.

summarized above, the Commission found that in these respects ex-lake grain was *like* ex-barge grain from Kansas City (carried by this appellee) but unlike ex-barge grain from Illinois (carried by Mechling). (Rep. 28; R. 32) In its order the Commission prescribed and approved the same rate difference between lake carriers and all barge carriers.

As to the by-passing of the Chicago gateway by lake grain, the Commission found in Table III of Appendix B to its report that during the period 1940 to 1943 (first ten months) 9,865,000 bushels of grain arrived at Chicago via lake. (Rep. 41; R. 48) The Commission found that this grain was attracted thereto by the ex-lake proportionals which apply therefrom to and through points in central territory where the grain is processed and reshipped under transit to eastern trunk-line and New England territories. (Rep. 18; R. 22) The Commission found that the particular differences just summarized "warranted" as to the ex-barge rates a variation "from the ex-rail and ex-lake proportionals." (Rep. 27; R. 32) However, in its ultimate conclusion the Commission fixed precise ex-barge rates for the future in relation to the local rates (Rep. 32; R. 36), and not in direct relation to the ex-rail and ex-lake rates assessed on the traffic received from competing connecting lines. The local rates which the Commission used as the standard for the ex-barge rates prescribed by it never constitute the "rates and charges" assessed by eastern lines on traffic received from connecting rail and lake lines.[10] Having prescribed precise ex-barge rates in direct relation to local rates, the Commission found that the relation thereof to existing

[10] On brief, the appellant states (p. 43): "These [the local rates] are the rates which the Commission used in determining the differentials which should be applied to the ex-barge grain moving out of Chicago.

ex-rail and ex-lake rates which happened to result from that prescription would be lawful. (Rep. 32; R. 36)

In its report, the Commission repeatedly treated with the level and relation of the through rates—inbound barge factor plus outbound rail factor as compared with inbound rail or lake factor plus outbound rail factor—in arriving at the measure of a lawful, separately published outbound factor on ex-barge grain. (Rep. 24-32; R. 28-36) Apparently the Commission thought its only duty in the premises was to fix an outbound factor for ex-barge grain in such amount as would produce a maximum reasonable through barge-rail rate.[11] On brief, the appellant states (pp. 50-51):

> Throughout its report, the Commission was careful to stress the fact that it was treating of a through barge-rail transportation service and that its one concern was to establish a reasonable and non-discriminatory charge for that service. Its task was the same as if it had been called upon to prescribe joint barge-rail rates under provisions of Section 307 (d).

In arriving at its ultimate conclusion, the Commission found that it should be guided by the effect of the rates

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[11] By its order of reopening, the Commission put in issue not only the lawfulness of the separately established proportional rates under Section 3 (4) but also the question of "what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by the A. L. Mechling, doing business as the A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed." (Rep. 9; R. 12) The Commission did not prescribe any joint rates in connection with Mechling. (Rep. 10; R. 14) Insofar as this appellee is concerned, no issue as to joint rates was presented for decision. The Commission directed its findings and order solely to the separately established outbound proportionals to be applied on ex-barge grain from origins served by Mechling as well as origins served by this appellee.

prescribed on the movement of traffic.[12] (Rep. 29; R. 36) In making findings as to that matter the Commission dealt principally with the combined inbound and outbound movements. It found that under the existing equality of outbound factors, traffic had been diverted from all-rail to barge-rail routes via Chicago. (Rep. 29; R. 36) The Commission made no categorical finding as to the effect of the prescribed ex-barge rates made 3 cents higher than the corresponding ex-rail or ex-lake rates. It did find that the higher outbound rate basis would cause some discount in the delivered prices paid at Chicago for ex-barge grain. (Rep. 29; R. 33) Other findings in the report show that the inbound shipper bears the burden of the inbound charges and of any discount in the prices paid in Chicago; and that the shipper elects to use either the barge service or the rail service inbound dependent on the net price received by him at his interior shipping station. (Rep. 16, 22-24; R. 20, 26-27) The effect of the discounted price at Chicago would divert some of the inbound traffic from barge lines to rail lines.

Upon the foregoing findings the Commission based its conclusion that the prescribed difference between the ex-barge proportionals and the ex-lake and ex-rail proportionals would not create such discrimination between connecting carriers as is prohibited by Section 3(4).

The court below found in substance that the foregoing findings do not support the order and have no rational relation to the conclusion that the ex-barge proportional rates should lawfully be higher than ex-rail and ex-lake proportional rates; that the Commission failed to observe and apply standards provided by the Interstate Commerce Act as amended in 1940; and that the order is invalid and should be enjoined.

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[12] Appellant on brief states (p. 63): "In determining a proper level of proportional rates the Commission set out the guiding principle which should govern its ultimate determination. This was fundamentally the effect on the movement of the traffic . . ."

Questions Presented

The order of the Commission prescribed proportional rates for application by the eastern railroads on ex-barge grain. The order further approved the relation between those prescribed ex-barge rates and the lower ex-rail and ex-lake rates maintained in connection with rail and steamer lines that compete with the barge lines west of Chicago.

The ultimate question here, as in most cases involving review of a Commission order, is whether the Commission acted within the limits of its authority and conformed to the statutory standards. However, the specific question presented by the complaint of this barge-line appellee may be stated with greater particularity; to do so will clarify the issue.

> *Do the Commission's findings support its conclusion that the relation between the ex-rail proportionals and the prescribed ex-barge proportionals does not result in a discrimination between connecting carriers within the meaning of Section* 3(4)?

The answer to this question necessarily involves an interpretation of the legal effect of Section 3(4) and an evaluation of the Commission's findings to determine whether they are legally relevant and whether the Commission's order is rationally based upon them. The subordinate questions thereby presented are:

1. Were the circumstances and conditions considered by the Commission applicable under Section 3(4) and the National Transportation Policy?

2. Is the approved difference between ex-barge and ex-rail rates rationally based upon the differences in circumstances and conditions which the Commission found?

SUMMARY OF ARGUMENT

Section 3(4) provides that no common carrier by railroad shall discriminate in its rates or charges between connecting carriers. It further defines the term "connecting carriers" as including *any* common carrier by water and *any* common carrier by railroad. It is the contention of this appellee that railroads are thereby enjoined from differentiating in their rates between connecting rail and water carriers except where such differentiation is reasonably related to differences in the circumstances and conditions surrounding the transportation service. We concede that if one connecting carrier originates the interchanged traffic at a point which is nearer or farther from the point of interchange than the origin at which the other connecting carrier receives the traffic, that fact may be considered by the Commission as a differentiating circumstance under the law. Likewise, if the eastern rail road performs substantially greater service in transporting grain received from one connecting carrier than from the other, that fact may lawfully be considered as a differentiating circumstance. The mere fact that one connecting carrier is a barge line and the other a railroad does not, under the terms of the statute, warrant a difference in rate treatment by the eastern railroads.

The order of the Commission now before the court prescribes proportional rates for application by the eastern railroads to grain reshipped from Chicago ex-barge. The order further approves the relationship between those ex-barge rates and the lower ex-rail proportionals which the eastern railroads presently maintain. Among others, the Commission approves for the Pennsylvania railroad a pro-

portional rate of 29 cents, to be charged for hauling grain from Chicago to New York when that grain is brought from Kansas City to Chicago by the Federal Barge Lines. The order approves the difference between that rate and the 26 cent rate which is charged by the Pennsylvania for transporting grain from Chicago to New York when it is brought from Kansas City to Chicago by the Alton railroad. The court below found that this order was not based upon sufficient findings of legally relevant circumstances and conditions differentiating the ex-barge service from the ex-rail service.

I.

A. Taking the findings of the Commission at face value, and assuming that they are substantially supported by the evidence, the report shows that the Commission found that the transportation service performed by the eastern railroads is substantially the same, ex-barge as ex-rail. However, the Commission found that, on the average, the eastern railroads performed more service on ex-barge grain than on ex-rail grain in respect to terminal service at the gateway, transit service east of the gateway, and line-haul service to southern central territory points. It further found that the average inbound barge haul from river origins is shorter than the average of the inbound rail hauls from all origins.

Other findings in the report show that not a single one of these differences holds true when ex-barge grain and ex-rail grain from the same origins are compared, and when the ex-rail grain demands and receives the services and privileges authorized by the rate tariffs. The present proportionals apply alike on ex-rail and ex-barge grain from Kansas City, both of which receive full origin

terminal service at the Chicago gateway, transit service east of the gateway, and precisely the same inbound haul. The same is true as to ex-barge grain from Illinois origins and this is likewise revealed by the Commission's report. As to the Illinois grain, the report further shows that the same line-haul service to southern central territory points is provided on ex-rail grain moving over circuitous routes as on ex-barge grain.

B. The Commission apparently recognized the total similarity of ex-barge and ex-rail traffic in these respects, when like is compared with like. For it averaged these circumstances as to ex-barge grain from river origins and then compared that average with the average of all-rail grain, not only from those origins, but from all origins served by railroads throughout the west and northwest. Those average differences are cited as justifying the Section 3(4) discrimination. They are not legally relevant under the statute.

The statute defines a connecting carrier as "any" common carrier by water. It thereby confers upon an individual common carrier, such as the Inland Waterways Corporation, the right to non-discriminatory treatment when compared with a particular railroad, such as the Alton railroad. This is because the only discrimination which affects Inland Waterways Corporation is the discrimination between it and a connecting railroad with which it competes.

To hold otherwise would be to deprive the statute of any sensible meaning.

Consequently, to average all water lines and then compare the result with the average of all rail lines, regardless of competitive relationships among them, is to subordinate individual comparisons to irrelevant averages. Such collective treatment essentially amounts to

treating connecting carriers according to types, and that is forbidden by the statute.

C. The National Transportation Policy provides for fair and impartial regulation of all modes of transportation so as to recognize and preserve the inherent advantages of each without unjust discrimination or unfair or destructive competitive practices. That policy does not require, but prohibits, the separate, collective treatment of all barge lines and all railroads so as to limit the protection of Section 3(4) to the average circumstances thus found. That policy does not qualify the individual rights of individual carriers which suffer from the discrimination prohibited by Section 3(4).

In other words, when the policy prohibits unfair competitive practices it refers to just such a practice as is approved by the Commission in this case. That practice consists of the eastern railroads charging more for the same outbound movements when performed for a barge line than when performed for a railroad. The eastern railroads have no interest in the barge-rail competition in western territory where they do not operate. Yet they aid their kindred western railroads by thus creating an artificial impediment to the traffic of the barge line.

D. The inherent advantage of barge service is its lower cost. That advantage is not recognized and preserved by the order of the Commission; rather, the Commission imposes a surcharge or penalty against the onmovement of the ex-barge grain which offsets the inherent advantage of the lower cost service up to Chicago. Since that surcharge or penalty is not found to be warranted by true differences in transportation circumstances and conditions relevant to the issue under Section 3(4), the Commission administered that section in a manner contrary to the National Transportation Policy.

E. The Commission in its report mentioned certain other "rate making circumstances" which it found in the detailed features of the all-rail rate structure. It purportedly based its order upon these circumstances. The position of this appellee is that no difference in rates between connecting carriers is justified by the fact that the ex-rail proportional is an average factor representing the outbound portion of varying through rates from different origins. Nor is such difference justified by the fact that the combination through all-rail rates harmonize with each other, or that the various gateways are equalized by such combinations. Appellee contends that whatever the ex-rail proportional may be, and however it may be arrived at, the eastern railroads may not charge a different proportional in connection with this appellee unless that difference is warranted by a difference in the transportation. Appellee does not claim that it is entitled to any particular proportional; it neither supports nor assails the measure of the present ex-rail proportionals. But if that proportional is applied in connection with the Alton railroad from Kansas City, this appellee is entitled to no less favorable treatment as to its operation from Kansas City.

F.—G. The mention made by the Commission in its findings as to the fourth section rule of the railroad tariffs is utterly inexplicable in view of Commission's own conclusion that this section of the Act does not apply to the rates and rate relationships involved in this case. As the Commission found, Section 6(b) of the Transportation Act of 1940 saves and cures all of these rates from the provisions of the fourth section of the Act. In order to set this matter at rest, however, it should be stated that as a matter of law Section 4(1) does not apply to a combination barge-rail rate which is lower

than the local all-rail rate from the intermediate reshipping point.

II. Nowhere is the arbitrary character of the Commission's order more clearly revealed than in that portion of its findings which compares ex-lake with ex-barge grain. Here the Commission finds that as to every one of the characteristics noted ex-lake grain is precisely similar to ex-barge grain from Kansas City, although it is dissimilar to ex-barge grain from Illinois origins. Yet that fact is given no effect whatever in the order which the lower court set aside. Just as significant is the further fact that the order of the Commission continues ex-lake grain on the same proportional rate basis as the ex-rail grain even though ex-lake grain is different from ex-rail grain in all of the respects in which the Commission found ex-barge grain to be different from ex-rail grain. There is no rational relation between the facts found and the rate relations prescribed.

II.

A. The Commission decided this case as if it had only one concern and that was to prescribe an outbound rail factor which would produce maximum reasonable through rates when added to the inbound barge rates. In so doing, it so far subordinated the requirements of Section 3(4) that it actually read that section out of the statute. The lower court held, and this court is asked to affirm, the proposition that the Commission must require the railroads to conform to all sections of the statute. Mere conformance of a rate to tests of reasonableness under Section 1 is not enough if the reasonable rate contains a prohibited discrimination among connecting carriers within the meaning of Section 3(4).

B. Section 3(4) requires that charges on the traffic received from one connecting line shall be properly related to the charges provided on traffic received from other connecting lines, allowances being made for differences in transportation circumstances and conditions, if any. The Commission did not discharge its function and duty under Section 3(4) when it related the ex-barge rates prescribed by it to the corresponding local rates. Such local rates do not constitute the rates and charges assessed by eastern railroads on traffic received from any connecting line.

C. The Commission sought to produce through barge-rail rates nicely related to the through all-rail combination. It considered as its guiding principle the effect of the various combinations upon the movement of traffic over the barge-rail and all-rail routes. In so doing, the Commission acted beyond the limits of its statutory authority because it failed to give effect to the requirement of Section 3(4) that no carrier shall discriminate between connecting lines in the separately established rates and charges provided by it for the on-movement of traffic received from such connecting lines. It is true that in prescribing reasonable rates under Section 1 of the Act the Commission is required to give due consideration to the effect of those rates upon the movement of traffic. This is specifically provided in Section 15a(2). But that section requires consideration of the effect upon the movement of the traffic *by the carrier for whom the rates are prescribed*. The Commission did not look in this case to the effect on the movement of traffic by the eastern railroads. Yet those are the railroads for whom the proportionals were prescribed. The fact that the prescription of non-discriminatory proportional rates might have an effect upon the movement of traffic as between the com-

peting connecting carriers in the west is a fact that is not legally relevant to the Section 3(4) issue.

III.

The lower court did not transgress on the administrative domain, but exercised its proper judicial function of reviewing the findings which the Commission made to determine whether those findings support the Commission's order as a matter of law. The court found that the Commission had based its order on findings of facts that were legally irrelevant to the issue before it. It correctly concluded that the order must be set aside.

IV.

The order of the Commission finds no support in the previous decision of this court in the case of *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671. In that case, the court held that the Commission had not prescribed proportional rates for ex-barge application and had not approved such rates under Section 3(4). In this case the Commission has expressly prescribed such rates and approved their relation to the ex-rail rates under that section.

In the previous case, appellees were found to claim that they are entitled, as a matter of law, to the existing rates; those rates included inconsistencies which were clearly not justified by the widely disparate factual circumstances involved. For example, the existing rates provided for the application of the northwest proportionals to Illinois ex-barge grain, although the traffics move from widely separated origin territories. No appellee here claims the continuance of such a rate structure.

In the cited case, this court held that Section 3(4) of the Act does not entitle a connecting carrier to the same proportional as is provided in connection with other connecting carriers regardless of differences in circumstances and conditions. The decision did not hold that the circumstances and conditions relied upon by the Commission in this case were legally relevant under that section. It is that further question which is now presented to the court for decision.

ARGUMENT

I. The findings of the Commission do not support its conclusion under Section 3(4).

The principal question presented by the complaint is whether the facts found by the Commission support an order approving the rate relation which the Commission fixed between ex-barge grain on the one hand, and ex-rail or ex-lake grain on the other. To answer that question we analyze every finding to ascertain (a) whether the report truly shows any difference in fact between the competitive traffics for which Section 3(4) requires non-discriminatory rates, (b) whether the prescribed rate relation is responsive to, or rationally based upon, the facts found and (c) whether the fact found is relevant as a matter of law under Section 3(4) and the National Transportation Policy.

In making this analysis, we are primarily concerned with the report as it applies to the complaint of this appellee which relates wholly to the relation between the proportionals prescribed on ex-barge grain from Kansas City on the one hand, and on the other hand the proportional provided for ex-rail from the *same* origin, and the proportionals provided for ex-lake grain from any origin when reshipped to eastern trunk line and New England territories. This phase of the case is virtually ignored by appellant on brief.[13]

[13] For example, appellant's description on brief of the basis for and history of the all-rail adjustment is confined to rates from Illinois origins. (Br. p. 41, 43, 44) In discussing the fourth section situation (Br. p. 45-48) the appellant ignores the non-

This appellee emphasizes the facts in its own case, not to distinguish its rights from those of the Mechling Barge Line, since it believes the rights to be common, but to illustrate the arbitrary and superficial manner in which the Commission dealt with the issues before it.

A. THE REPORT DOES NOT TRULY FIND DIFFERENCES IN TRANSPORTATION CIRCUMSTANCES AND CONDITIONS SURROUNDING THE COMPETITIVE TRAFFIC BROUGHT FROM KANSAS CITY TO CHICAGO BY THIS APPELLEE AND THE RAIL LINES WITH WHICH IT COMPETES.

The specific facts and circumstances which the Commission found and relied upon as warranting the rate differences prescribed and approved by it are stated in numbered paragraphs of its report at 262 I. C. C. 28. (R. 32). They are summarized in the statement above (pp. 7 to 14, *supra*) together with all pertinent subordinate findings and facts necessary to a determination of the questions presented.

Four of the principal differences found by the Commission relate to certain conditions incident to the inbound haul of this appellee and competing railroads, or

applicability of its argument to the rate adjustment from Kansas City. Appellant treats with the varying proportionals to central territory as if the tariff provisions now in effect on ex-barge grain from Illinois likewise govern ex-barge grain from Kansas City (Br. p. 35, 38-39) although the fact is to the contrary. (Rep. 13, 20; R. 16, 24) Appellant suggests that the "barge transportation in question" is intrastate commerce (Br. p. 48, n. 11), which could not possibly be true as to barge transportation from Missouri to Illinois. Appellant argues that conditions surrounding the transportation of ex-barge grain are different from those surrounding the transportation of ex-lake grain. (Br. p. 56-57), and advances grounds which, even if relevant and true—both being denied by the appellees—could apply only to ex-barge grain from Illinois and not to ex-barge grain from Kansas City.

to the outbound haul performed by the eastern railroads. The Commission found that these were differentiating circumstances because it found differences in the average conditions when combined for all of the all-rail grain and for all of the barge-rail grain, regardless of particular origin or competitive movements. Specifically, the Commission found that ex-barge grain was different from ex-rail grain (excluding ex-lake grain for the time being), because there is, on the average:

1) More terminal service at the gateway on ex-barge grain.

2) More transit service east of the gateway on ex-barge grain.

3) Less line-haul service on ex-rail grain moving over direct routes to destinations in the southern part of central territory, than on ex-barge grain moving over circuitous barge-rail routes.

4) Shorter inbound hauls via barge than via rail.

Other findings on the face of the report show that not a single one of these differences exists when the ex-rail grain (a) originates at the same point as the ex-barge grain, (b) moves inbound to Chicago via the particular rail lines with which the barge line is in competition from such origin, and (c) is stored in transit at Chicago with a view to subsequent reshipment in the usual course of merchandising as is its right and practice under the tariff. The Commission finds that ex-rail grain that *is* stored in transit and receives a full origin terminal service at the Chicago gateway is given the same reshipping rates as if not so transited (Rep. 14; R. 18); it finds that the same proportionals are provided for ex-rail grain that moves over circuitous routes via Chicago as for ex-rail grain moving over the direct routes (Rep. 13, 17; R. 17, 21); and it finds that the reshipping rates to

eastern trunk-line and New England territories apply on ex-rail grain from all origins, regardless of the length of the inbound haul. (Rep. 17; R. 21) As to transit service east of Chicago, the Commission found that the proportionals apply on ex-rail grain regardless of whether or not transit is taken at intermediate points. (Rep. 14; R. 18) The Commission neglected to mention the undisputed fact that when transit is taken, an additional charge over and above the line-haul rate is assessed. (R. 199; Fdg. 28(e), note 37(a)) On the face of the report, therefore, it is plain that all ex-rail grain will continue to enjoy the 26-cent reshipping rate to New York. It is equally plain from the report that such ex-rail grain includes grain that is transited at Chicago and receives a full origin terminal service at that point, moves over circuitous routes via Chicago; moves from short haul western origins; and is transited at points intermediate east of Chicago. It follows that the four differences specified by the Commission are not true differences in circumstances between the traffic of connecting inbound carriers and the general finding of the Commission in regard thereto does not support its order.

B. FINDING OF DIFFERENCE BETWEEN AVERAGE EX-RAIL TRAFFIC AND AVERAGE EX-BARGE TRAFFIC IS NOT LEGALLY RELEVANT UNDER SECTION 3(4).

Assuming, *arguendo*, that there are differences in respect to the four circumstances just considered when all of the all-rail grain is averaged and compared with the average for all of the ex-barge grain, the Commission's findings to that effect are not legally relevant under Section 3(4).

Section 3(4) prohibits discrimination between connecting carriers, including both common carriers by rail and by water. Rail grain originates at Kansas City, moves therefrom to Chicago, and a transit privilege (a stop for

temporary storage or for processing) is provided at that point without charge other than the line-haul rate. That movement via a connecting rail line is given a 26-cent proportional rate to New York. Barge grain moving to Chicago and reshipped therefrom under identical conditions from beginning to end must pay 3 cents more, or 29 cents. The differences found by the Commission provide no rational support for the order which prescribed those rate discrepancies for this competitive traffic.

The Commission by the findings above summarized concedes the lack of difference when the comparison is limited to connecting carriers hauling from the same origin. It therefore averages all of the ex-barge grain (from Kansas City and Illinois River points) on one side of the equation, and all of the ex-rail grain (from all western, southwestern, and northwestern states) on the other side of the equation. This is irrational under Section 3(4). That section, as amended in 1940, protects "any" common carrier by water. This appellee or any other individual water carrier is entitled to complain in its own right and is entitled by statute to have only its own circumstances considered on the barge side of the equation. Similarly, the carriers in whose favor discrimination may not be practiced include "any" carrier by railroad. The complaint of this appellee is directed squarely to the more favorable charges on the traffic of the particular carriers which operate from Kansas City to Chicago. Only their conditions may be considered on the rail side of the equation if proper meaning is given to the word "any" in Section 3(4).

In *North Carolina* v. *United States*, 325 U.S. 507, 89 L. ed. 1760, this Court set aside an order of the Commission entered under Section 13 which required railroads in North Carolina to increase their intrastate passenger fares to

the same level per mile as the Commission had found reasonable for interstate application. The state authority had permitted some railroads to make effective fares of 2.2 cents per mile, the same as the Commission had found reasonable for interstate application. However, four railroads were refused permission to increase their intrastate fares above 1.65 cents per mile. The order of the Commission required the four carriers to make an increase to 2.2 cents per mile. The Commission contended that its order was supported by its general conclusion that intrastate fares below 2.2 cents per mile discriminated against the interstate commerce. This Court held that such conclusion, if based on findings supported by evidence, would justify the order. Nevertheless, the order was set aside because the Commission failed to make specific findings to support a conclusion of discrimination against interstate commerce on the part of the "particular" railroads involved in the order. Discrimination in the instant case, as in the case cited, is personal; it is peculiar to the individual receiving the alleged unwarranted favor on the one hand and, on the other hand, the individual or individuals subjected to the alleged unwarranted disadvantage.

When the Commission tested the lawfulness of the reshipping rate relations by averaging conditions from all western, northwestern, and southwestern states for railroads, and by averaging conditions from Kansas City and Illinois River points for barge lines, it took into consideration facts which could not legally influence its judgment. In so doing, it acted arbitrarily and beyond the limits of its authority under the standards provided by the Act.

To the extent that the Commission based its order upon the average circumstances of all carriers in a group, and failed to consider the particular conditions of this appel-

lee and the individual railroads with which it competes, its order must fall for the same reason that this court condemned the order in *North Carolina* v. *United States*, 325 U.S. 507, 518.

C. THE COMMISSION'S METHOD OF TESTING RATE RELATION BY SEPARATE AVERAGES OF DIFFERENT MODES OF TRANSPORTATION IS NOT REQUIRED BY THE NATIONAL TRANSPORTATION POLICY.

The Commission states (Rep. 31; R. 35):

> The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same outbound proportional if, as the Act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower inbound costs but, in addition would extend to the barge-rail transportation most of the advantages of all-rail transportation.

Appellant discusses the National Transportation Policy at pages 30 to 35 of brief. No mention is made there of the above finding. It apparently means that a barge line complaining under Section 3(4) is not entitled to have the particular circumstances of its traffic compared with the particular circumstances of the traffic carried by the rail line with which it competes. Rather, the Commission holds that carriers via different modes of transportation must be treated collectively, according to groups, regardless of whether or not they operate in the same field or compete with one another. One group should include all connecting barge lines, although one of them competes with the Rock Island Railroad operating from Morris to Chicago, and the other competes with the Alton Railroad and similar carriers operating from Kansas City to Chicago. The other group should include all connecting railroads, although some serve southwestern, far western, and northwestern origins where no water

carriers operate, and others do compete with the barge lines from Morris and Kansas City. This is the equivalent of finding that mere difference in mechanical means of transport by connecting lines—by water in the case of one and by rail in the case of the other—is a distinguishing circumstance under Section 3(4) which alone serves to put beyond the reach of judicial review whatever rate disparity the Commission sees fit to approve. This stretches the doctrine of administrative finality beyond the breaking point.

No such requirement can be read into the National Transportation Policy. It provides for "fair and impartial regulation of all modes of transportation" so as "to recognize and preserve the inherent advantages of each." Those provisions do not require that all carriers of a given mode be collectively averaged in separate groups, when the protection of Section 3(4) is being considered. Rather, they forbid such treatment.

The object of the policy, among other things, is to "promote economical and efficient service" and "foster sound economic conditions in transportation and among the several carriers." That does not authorize the Commission to ignore the right of individual carriers; rather it recognizes the right of individual carriers to impartial regulation.

An additional object is to encourage the establishment and maintenance of reasonable charges "without unjust discriminations" or "unfair or destructive competitive practices." That does not qualify the right of "any" connecting line to complain of discrimination within the meaning of Section 3(4). Rather it recognizes the unfairness of an eastern railroad differentiating in its rates between connecting carriers solely because of differences in the type of carriage employed.

The statement quoted above recognizes that the averaging process for determining ex-rail proportionals confers "advantages" on rail traffic from the particular origins served by the appellee barge lines. The Commission withholds those "advantages" from traffic brought to the same reshipping point by the appellee barge lines from the same origins. That is squarely in the teeth of the prohibition of Section 3(4).

The Commission reads the National Transportation Policy as if it amended Section 3(4) so as to approve discrimination between connecting lines of different types. The legislative history of the 1940 amendment shows that Congess had a contrary intention. Congress intended to require the same treatment of a connecting water line as of a connecting rail line, unless transportation conditions incident to the services performed on the respective traffics of the individual carriers warrant a rate difference.

The Commission also says (Rep. 31; R. 35):

> However, all of the ex-barge traffic can and should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practicable the commercial needs thereof, just as ex-rail traffic, for similar reasons, had been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation.

This appellee contended before the Commission that the proportionals to eastern trunk-line and New England territories should be uniform for the Mechling traffic from Illinois and for appellee's traffic from Kansas City. It did so only because precisely that same treatment is provided for the traffic of rail carriers which originates at Morris and Kansas City, respectively. It contended to the Commission that that similarity of circumstance

justified like treatment for ex-barge grain. That, however, was secondary to its prime contention that the eastern proportionals on its traffic should not differ from those provided on the traffic of competing rail lines serving the same point of origin, Kansas City, to any greater extent than might be warranted by the circumstances and conditions under which the competitive traffics moved. This appellee does not compete with the Mechling barge line in transporting grain from Illinois origins and would not object to a proportional on the Mechling traffic either higher or lower than that on the traffic of appellee, if the circumstances warrant.

D. THE COMMISSION, WITHOUT WARRANT, FAILED TO "RECOGNIZE AND PRESERVE" THE ADVANTAGES OF LOW-COST WATER TRANSPORTATION AS REQUIRED BY THE NATIONAL TRANSPORTATION POLICY.

Appellee submits that the Commission acted arbitrarily because on the face of its report it failed to observe and apply the standards of Section 3(4). The requirements of the National Transportation Policy are relied upon only because they spotlight that failure.

Appellant agrees that the inherent advantage of water transportation is its lower cost. (Br. pp. 31, 33) That inherent advantage is offset in part by the extra expense of trucking grain to the river bank from Illinois producing points. (Rep. 22, 40; R. 26, 48) In the case of grain from Kansas City, which originates away from the river bank, that inherent advantage is offset in part by extra switching and loading charges. (Rep. 23; R. 27) In case of a through movement from Kansas City to a processor at Cleveland, that inherent advantage is offset in part by the additional expense of 3.5 cents incurred as an incident to the transfer from barge to car, a transfer not necessary when all-rail grain moves in continuous service.

(Rep. 23; R. 27) The net advantage, after these offsets, is the direct product of the difference between the inbound rates to Chicago by barge as compared with via rail. That net advantage is recognized when the grain is delivered at Chicago under the existing adjustment. The ex-barge grain now sells at a parity with ex-rail grain and the shipper enjoys the full benefit of the net saving in inbound transportation rates and charges. (Rep. 23; R. 27) When the same outbound rates are applied on both ex-barge and ex-rail grain, as at present, that net advantage of the low cost water service to Chicago is preserved and reflected in the combination through rates to ultimate destination. It is not preserved when the ex-barge rate is made 3 cents higher than the ex-rail rate. This shows an administration of the act at variance with the National Transportation Policy since the Commission failed to find any true differences in transportation circumstances relevant to the issue under Section 3(4) which could possibly warrant it in imposing a rate disparity east of Chicago so as to offset the net inbound rate advantage of the water service.

E. FINDINGS OF SO-CALLED "RATE MAKING" CIRCUMSTANCES NOT LEGALLY RELEVANT UNDER SECTION 3(4).

We have discussed above the differences which the Commission found in the average transportation conditions as between different types of connecting carriers. We point out that average differences do not warrant rate differences between individual carriers. Further, the Commission made no finding of any difference as between connecting rail and barge lines from the same origin.

In addition, the Commission found that there were certain "rate-making circumstances characteristic of the

all-rail traffic, but not of the barge-rail traffic." These differences may be stated as follows:

5) The uniform ex-rail proportional represents an average of the varying proportionals which would be produced if the proportional for each origin—some near to and some far from Chicago—were based on a through mileage scale.[14]

6) The uniform ex-rail proportional is the component part of many through rates of different amounts which vary with the lengths of inbound haul and the western factors applicable thereto.

7) The uniform all-rail proportionals from gateways (Chicago, Peoria, and St. Louis) when added to inbound rail rates produce the same combination through rate via each gateway, which is called equalization.

8) The combination of rail factors to and from Chicago results in through rates which harmonize with each other and with local rates in official territory.

9) The uniform ex-rail proportional applies only when the inbound rate via rail is 8.5 cents or higher.

These circumstances or characteristics have no legal relevancy to the Section 3(4) issue. This is made plain by analyzing the alleged difference found in the statement that the ex-rail proportional represents an average of proportionals that vary with the length of the inbound haul.

This finding has to do with testing the measure of a proportional rate by treating it as a portion of a through rate constructed under a mileage scale from western origins to eastern destinations. In such case, the proportional for the eastern haul will be larger when the

[14] The calculations on which the Commission predicates this finding are shown on pages 15 and 16, and in Tables III, IV, and V to Appendix A to its report. (R. 19, 44, 45, 46.)

inbound haul is short, and smaller when the inbound haul is long. This is because rates proportioned to distance by a mileage scale show a decreasing rate of progression for longer hauls. The rate for a given number of miles at the end of any particular haul is therefore less when the through distance is long than when it is short.

The Commission here observes that, tested in the manner just described, a higher proportional from Chicago to New York will result for grain originating at Morris than for grain originating at Kansas City. Similarly, the proportional for grain originating at Kansas City will, in turn, be higher than for grain originating in Montana, Colorado, or Texas. (Rep. 15-16; R. 19)

The Commission thus finds that the eastern railroads have averaged such varying proportionals so as to provide a uniform proportional for ex-rail grain from all origins. This means that the Chicago, Rock Island & Pacific Railroad bringing grain from Morris, Ill., to Chicago obtains a proportional lower than it would if the traffic from Morris were considered separate and apart from grain from other origins. Likewise, the traffic brought by the Alton Railroad from Kansas City to Chicago secures a proportional somewhat lower than if the reasonable measure of that proportional were determined by considering Kansas City only. And, as to far western origins, that rail traffic pays proportionals somewhat higher than the reasonable measure of a proportional determined solely for the far western origins.

Under Section 1 of the Act, it is unquestionably within the Commission's authority to consider the foregoing matters and to fix whatever proportional is required by conditions surrounding the traffic from a particular origin, even though other origins and other traffic may be pro-

vided by the carriers with relatively lower proportionals. Under Section 3(4) the circumstance noted has no relevancy to the relation of rates between connecting carriers that haul from the same origin. If the proportional on grain brought to Chicago from Kansas City by the Alton Railroad is lower than a maximum reasonable proportional, whether that results from an averaging process or from any other method of fixation, Section 3(4) guarantees to this appellee a proportional equally below the maximum reasonable basis, provided always that there is no other difference in relevant circumstances which justifies a rate difference.

The additional differences found in "rate-making circumstances" have no rational connection with the rate discrepancies prescribed and approved by the Commission.

The fact that the ex-rail proportional is the component part of many through rates of different amounts which vary with the length of the inbound hauls and the western factors applicable thereto does not differentiate the ex-barge from the ex-rail traffic. It is equally true of any ex-barge proportional whether made the same as the ex-rail proportional or 3 cents higher. When any factor east of Chicago is added to western local rates which vary because of the difference in the lengths of the inbound haul, the through rates are bound to vary in an equal degree.

The gateway equalization in the all-rail rate structure does not touch, even remotely, the rate discrimination which the Commission prescribed and approved. It may be, although the Commission does not so find, that the gateway equalization has resulted in an ex-rail proportional from Chicago that is lower than it would be if Chicago were considered independently and without regard to equalization. If so, the inbound traffic of this

appellee is entitled to equally favorable treatment unless there is a difference in other relevant circumstances which justifies a rate difference. Otherwise, a mere difference in mode of inbound transportation is sufficient to warrant the rate discrepancies prescribed by the Commission. To illustrate: Assume that rail carrier "A" operates from Kansas City to Chicago, but does not serve Peoria and St. Louis. Rail carrier "B" operates from Kansas City and serves not only Chicago, but also Peoria and St. Louis. In that situation, suppose the eastern railroads applied a higher reshipping rate from Chicago when in connection with carrier "B" than in connection with carrier "A," so as to equalize the several gateways served by "B." It is not conceivable that under those facts alone the Commission would approve the resultant rate difference as a necessary incident to the Peoria and St. Louis equalization. On the face of it, the two would have no relation. There is the same lack of relation when considering ex-barge in comparison with ex-rail traffic.

In this connection the Commission noted that Peoria and St. Louis would be entitled on reasonable request to ex-barge proportionals properly aligned with those approved from Chicago. However, it found that the record did not contain sufficient detail for the prescription of such proportionals in the proceeding before the Commission. That is no fault of this appellee, who is only concerned with preventing a discriminatory adjustment at Chicago. This appellee is entitled to have the proportional adjustment east from Chicago properly adjusted in conformity with Section 3(4), regardless of what may be reasonable or otherwise proper as to ex-barge proportionals from St. Louis and Peoria.

The next finding made by the Commission is that the ex-rail proportional combines with inbound interstate rates

to result in through all-rail rates which harmonize with each other and with local rates in official territory.

What the Commission meant by "harmonize" is not made clear, and there is no finding that the existing adjustment on ex-barge traffic does not so harmonize. If the Commission referred to the difference in relative levels for through hauls, its very order creates disharmony. It is impracticable and impossible to provide any adjustment of through barge-rail rates which will not be relatively less than the corresponding all-rail rates, and, at the same time, preserve and reflect the inherent advantage of low-cost barge transportation.

Furthermore, the question before the Commission under Section 3(4) was utterly foreign to the relation of through barge-rail to through all-rail rates. That point is developed in the next section of this brief.

F. THE ORDER IS NOT RATIONALLY BASED UPON FINDING THAT EX-RAIL PROPORTIONAL IS SUBJECT TO FOURTH-SECTION RULE.

The final "rate-making circumstance" listed by the Commission as differentiating ex-barge and ex-rail traffic has to do with the so-called fourth-section rule in the railroad proportional rate tariff. This rule requires a minimum inbound rail rate of 8.5 cents to make the proportionals apply. The rule does not apply to ex-barge or ex-lake grain. We show that this circumstance has no legal effect upon the Section 3(4) issue. It should be noted first, however, that the order of the Commission approving higher rates, ex-barge than ex-rail, bears no rational relation to this circumstance but is wholly arbitrary and capricious so far as Section 4 of the Act is concerned.

In the first place, the stated difference is not true as to this appellee because the inbound barge rate from Kansas

City to Chicago is in excess of 8.5 cents and does not come within the operation of the rule. On the other hand, the inbound rate of Mechling is 2 cents, due to the shorter water haul from Morris. In this situation, the order of the Commission prescribed an identical outbound proportional in connection with ex-barge grain moving on both these inbound rates. Thus, the Commission is in the position of supporting a difference in rates between connecting rail lines and water lines by a difference that does not exist as to one water line. The order is not rationally related to the facts.

Secondly, the order prescribes proportional rates which do not themselves meet the test of the fourth-section rule cited by the Commission. Mechling is the only carrier as to which the circumstance could possibly have any bearing, and Mechling's 2-cent rate is 6.5 cents less than the 8.5-cent minimum called for in the rule. Yet the prescribed ex-barge proportional is only .3 cents higher than the ex-rail proportional. Consequently, under the prescribed proportional the rate will still be 3.5 cents short of the goal which that rule sets up. A circumstance further illustrating the arbitrary nature of the Commission's order.

G. FINDING AS TO THE SO-CALLED FOURTH-SECTION RULE IS LEGALLY IRRELEVANT UNDER SECTION 3(4).

It is plain on the face of the Commission's report and from the effect of its order that it did not consider either the fourth-section rule in the tariff or Section 4 of the Act as constituting legal justification for the difference in rates between connecting carriers. Yet in the absence of legally relevant differentiating circumstances that would warrant the rate relationship prescribed, the Commission clung to the circumstance stated in this connection, and

on brief appellant urges that Section 4 of the Act supports the rate relationship which the Commission approved. (Brief of appellant, pp. 45-48) For that reason it should be stated clearly and unequivocally that the appellee's right to non-discriminatory treatment by a connecting carrier is not modified by Section 4.

1) The law specifically exempts this situation, as the Commission conceded. (Rep. 32; R. 37) It there found that under Section 6(b) of the Transportation Act of 1940 (54 Stat. L. 904; 49 U.S.C. sec. 4, note) the existing combinations are not prohibited by Section 4(1) of the Act as amended, even though lower than the local rates from Chicago to the same destinations. That finding disposes of the matter completely, but if it did not there are additional propositions that support our view.

2) The combination of the existing factors on grain transported by this appellee to Chicago and reshipped therefrom by rail exceeds every one of the local rates from intermediate origins and the Commission so finds. (Rep. 20-21; R. 24) The fourth section is inapplicable, no matter how construed. This appellee has its individual rights under Section 3(4), although they were ignored by the Commission in its report and are not mentioned by the appellant in its brief. This appellee assails the validity of the Commission's order as applied to reshipping rates on the grain which it transports to Chicago. When a particular circumstance relied upon by the appellant as supporting its order does not in fact pertain to the traffic of this appellee, the appellant should so state.

3) Even though Section 6(b) of the Transportation Act of 1940 had not been enacted, Section 4(1) would not apply here because the higher rate from an intermediate point is the local rate of a railroad, and the lower through rate from a more distant point is a combination of a water

rate factor to a reshipping point and a separately published railroad proportional rate beyond. It is the difference of 8.5 cents between the railroad's local and proportional rates which makes possible a through rate less than the local rates. That difference is wholly within the control of the eastern lines, and a barge line cannot be held responsible for any fourth section departure that may result from adding its reasonable and compensatory inbound rate to the eastern factor maintained by another carrier. Section 4(1) defines a particular kind of preference and prejudice. *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U.S. 1, 22. This Court has held that a carrier cannot be held responsible for preference and prejudice unless it controls both the rate alleged to be prejudicial and the rate alleged to be preferential. *Central Railroad Co. of New Jersey* v. *U. S.* (1921), 257 U.S. 247.

4) Section 3(4) confers a right on this appellee to be free from discrimination practiced against it by eastern railroads. It should not and cannot be deprived of that right on the ground that the removal of the discrimination by one of the alternative means open to the eastern lines would result in violations of other sections of the Act. *American Fruit Co.* v. *Rapid City D. H. & W. R. Co.*, 163 I.C.C. 211; *Wise-Peterson Box Co.* v. *M. & O. R. R. Co.*, 46 I.C.C. 693, 696.

Finally, to set up Section 4(1) as a barrier to equal treatment of connecting rail lines and barge lines when the transportation circumstances merit equal treatment would be to subordinate the general and all-inclusive prohibition of Section 3(4) to the incidental provision in Section 4(1). Sections 3 and 4 must be accorded a harmonious construction. *United States* v. *Louisville & N. R. Co.*, 235 U.S. 314.

H. THE ORDER IS NOT RATIONALLY RELATED TO DIFFERENCES BETWEEN EX-LAKE AND EX-BARGE GRAIN.

The arbitrary character of the Commission's order is illustrated most clearly when we come to analyze the findings which it made as between ex-barge and ex-lake grain. The similarities and differences found by the Commission (Rep. 28; R. 32) are set out in the statement above and may be paraphrased as follows:

> 1) Lake grain from the Northwest consists chiefly of wheat. This is also true of barge grain from Kansas City, but is not true of barge grain from Illinois.
>
> 2) Lake grain from the Northwest has a relatively long water haul inbound and is usually preceded by an inbound rail haul. That is also true of barge grain from Kansas City, but is not true of barge grain from Illinois.
>
> 3) The rail-lake combinations in general confirm to the principles which underlie Section 4. That is also true as to the barge grain from Kansas City, but it is not true as to barge grain from Illinois.

Insofar as this appellee is concerned, the foregoing findings relate wholly to *similarities* and not to differences. Yet in the face of these similarities the Commission prescribed and approved on the traffic of this appellee the identical rate relation as on the traffic of the Mechling Barge Line, which serves the Illinois origins found to be handled under dissimilar circumstances. Moreover, the Commission approved in connection with this appellee proportionals higher than ex-rail, although the ex-lake grain continues to receive the same proportional as ex-rail. The stated findings provide no rational basis for such result.

The Commission makes one additional finding as to a difference in conditions between ex-barge and ex-lake. It finds that the barge-rail grain always moves through Chicago, while the lake-rail grain can, and generally does,

by-pass that gateway to start its rail journey at lower lake ports. (Rep. 18, 28; R. 22, 32)

On that point the Commission in Appendix B to the report shows that in the period 1940 to 1943 (first ten months) 9,865,000 bushels of grain arrived at Chicago via lake. (Rep. 41; R. 48) The Commission also found that this grain was attracted to Chicago by the present proportionals; that the uniform proportional on ex-lake grain permits it to be handled by Chicago dealers without discount; and that it is reshipped to points in central territory where the grain is processed and reshipped under transit to eastern trunk-line and New England territories. That particular ex-lake grain does not, therefore, by-pass the Chicago gateway. It cannot do so because central territory processors are not in line of movement from Lake Erie and Hudson River ports to eastern trunk-line and New England destinations. The competition of ex-barge grain with ex-lake grain is in serving these central territory processors under transit on the basis of the uniform proportional rates to eastern trunk-line territory. The finding of the Commission as to ex-lake grain by-passing Chicago provides no rational support for the rate discrepancy prescribed by the Commission on that traffic.

Finally, the Commission finds that the ex-lake rates from Chicago do not adversely affect the barge-line appellees because, says the Commission, if the ex-lake rates were increased so as to be higher than ex-barge, the lake grain from the Northwest would flow to Lake Erie and Hudson River ports without corresponding benefit to the barge-line appellees. (Rep. 29; R. 33) That conclusion is contradicted by the earlier finding of fact as to the actual movement of ex-lake grain to central territory processors who cannot be served through Lake Erie and Hudson River

ports. This further attempt of the Commission to differentiate between ex-lake and ex-barge grain provides no rational basis for the rate discrepancies prescribed and approved by it.

II. The Commission failed to make findings sufficient to support the assailed discrimination between connecting carriers.

It is demonstrated in the foregoing section of this brief that the findings of the Commission are not relevant to the issue under Section 3(4). Further, it is shown that the prescribed difference in rates between connecting carriers has no rational basis in the circumstances which the Commission found in support of such rate relationship. In so doing, we have accepted the report of the Commission at face value and treated it as if the Commission had squarely faced the Section 3(4) issue, which it purported to do. Yet when the individual findings are analyzed as above, it becomes clear that the Commission erroneously conceived that the extraneous matters mentioned somehow modify the meaning of that prohibition. The attention given that section is more virtual than real.

Where as here there is question as to the interpretation which the Commission placed on a certain provision of the law, this court will look to the brief and argument of the Commission and accept the statements found therein as to the Commission's position. *United States v. Illinois Central R. Co.*, 291 U.S. 457, 461. This court has on occasions requested of the Commission a brief on its behalf discussing the meaning and application of its order. *Illinois Commerce Commission v. Thomson*, 318 U.S. 675, 681. In this case, the fact that the order of the Commission bears no reasonable relation to the various conditions and circumstances which it noted in its findings gives rise to the

searching question as to what the Commission really regarded as the guiding principle in its decision in this case. Put differently, the question is: what were the real views of the Commission and how was it guided in the fixing of the rate relationships prescribed in its order?

The real views of the Commission are made plain in its brief before this Court. Counsel for appellant makes no attempt to explain the rationale of the Commission's findings insofar as they purport to deal with the Section 3(4) issue. Throughout that brief the effort is to distract the Court's attention from the shortcomings of the report in this connection by urging (a) that the real problem and duty of the Commission in this case was to fix reasonable and nondiscriminatory through combination barge-rail rates; (b) that the fundamental guiding principle which the Commission had to follow in performing that duty was to make barge-rail rates properly related to the all-rail rates from the standpoint of the effect of those rates upon the movement of traffic over the all-rail and barge-rail routes; and (c) that the lower court exceeded its function and invaded the field of administrative discretion in its review of the Commission's order. By this argument counsel, in effect, pleads the Commission guilty of a failure to conform to the statutory standard as laid down by Section 3(4).

A. THE ORDER ATTEMPTS TO FIX REASONABLE THROUGH RATES WITHOUT REGARD TO SECTION 3(4).

At the further hearing the sole issue of concern to this appellee was whether, under all the facts, ex-barge proportionals relatively higher than ex-rail or ex-lake proportionals would violate Section 3(4). That section, as amended by the Transportation Act of 1940, provides that common carriers by railroad shall not discriminate in their rates and charges between connecting lines, and the term

"connecting lines" is defined as including "any" common carrier by railroad and "any" common carrier by water.

The appellant says that the reopened proceeding was to determine the "measure" of proportional rates on ex-barge grain. (Brf. p. 5) That measure was in issue, but not alone. To refer only to measure ignores the issue of lawful rate relations (ex-barge compared with ex-rail and ex-lake) under Section 3(4): A lawful rate relation is a matter separate and apart from a lawful rate measure. The lawful measure of rates is determined under Section 1 according to standards there provided. This appellee has no interest in the intrinsic measure of the ex-barge rates, and, therefore, raises no question as to the validity of the Commission's order under Section 1.

That the Commission thus failed to conform to the standard of Section 3(4) is apparent from a reading of the report. It is there made plain that the Commission considered the case as one calling only for the prescription of reasonable *through* combination ex-barge rates. Repeated references are made in the findings to differences between barge-rail, lake-rail, and all-rail circumstances. (Rep. 27-28; R. 31-33) Those terms relate to through movements from origins west of Chicago to destinations east thereof. This indicates that the Commission did not, in fact, dispose of the Section 3(4) issue as to the separately maintained proportional rates of the eastern railroads, but rather looked only to the combination through rates and their relation to each other.

Counsel for appellant spotlights this error. At pages 50-51 of appellant's brief it is succinctly stated (emphasis supplied):

> "Throughout its report the Commission was careful to stress the fact that it was treating of a through barge-rail transportation service, and that its *one concern* was to establish *reasonable* and non-discriminatory

charge for *that service*. Its task was the same as if it had been called upon to prescribe joint barge-rail rates under the provisions of Section 307(d).

Through its own counsel, the Commission pleads guilty of testing the discrimination by standards of reasonableness under Sections 1 and 307(d) of the Act, rather than by standards of fairly related and non-discriminatory rates under Section 3(4) of the Act.

In other portions of its brief, appellant emphasizes its view that the case before it involved only the reasonableness of through rates and that the case involved no separate issue as to lawful relation under Section 3(4) of the eastern proportionals accorded by the respondents to their western connections.

On page 34 of brief it states that the problem before the Commission was one of "administration, to determine what rates for the ex-barge traffic would be fair and equitable from the standpoint of the two types of carriers involved." The statute prohibits discrimination, and does not authorize the Commission to prescribe rate relations in the light of what would be "fair and equitable" if that means something different than non-discriminatory.

At pages 36 to 38 of brief, appellant describes certain of the western rail factors with emphasis on their reasonableness. Those factors have no bearing on the Section 3(4) issue.

At page 38 of brief, appellant says that appellees rely upon the existing ex-rail proportionals as a "true measure of reasonableness and lawfulness for the ex-barge traffic out of Chicago." That is not so as to reasonableness. The barge-line appellees had no standing before the Commission and have none in this Court to complain of rates as unreasonable, since they are not shippers. The only interest of the barge-line appellees in these rates is in the relation

of the ex-barge to the ex-rail and ex-lake rates. That interest is precisely the same, regardless of the measure of the rates and regardless of whether or not they are reasonable under Section 1 standards.

We raise no question as to the authority of the Commission to predicate its conclusion as to the reasonableness of rates under Section 1 on any characteristics which it here considered. That is not involved in the complaint of this appellee. To show that a given circumstance is relevant to the issue of reasonableness, does not show that it is relevant to the issue of discrimination. The field of inquiry under the latter issue is different. It extends only to circumstances which bear upon rate relations, and does not extend to circumstances which bear upon rate level, *per se*, considered apart from the lawfulness of the rate relations. This has been repeatedly recognized by this Court.

In *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U.S. 263, and at page 277 this Court said:

> We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by *Mr. Justice Blackburn* in *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

See also *American Exp. Co.* v. *South Dakota ex rel. Caldwell*, 244 U.S. 617, 624, and *United States* v. *Illinois C. R. Co.*, 263 U.S. 515, 524.

At page 41 of brief, appellant says that the eastern ex-rail factors represent a lesser division of the through rate than would have resulted from a rate constructed on a mileage scale, and "therefore, afforded no proper basis for comparison." That may be true of a comparison offered on the issue of what is a maximum reasonable rate under Section 1. Whether or not it would be true in such a case will not be considered because that question is not presented. But when the comparison is offered on the question of discrimination under Section 3(4) it is not only proper but is the only comparison by which the alleged discrimination can be tested. And this is so whether or not the proportional rates given to the favored connections are above or below a reasonable level.

A proportional rate is an independently maintained, separable part of the through charges. As such, it must meet all standards of lawfulness standing alone.[15] This is particularly so with respect to the requirements of Section 3(4), because that section deals only with the treatment by a carrier of its connecting carriers. It therefore aims only at the proportional rate in which the carrier treats with its connections. The section has nothing to do with combination through rates.

The Commission conceded in its report that proportional rates are subject to the same criteria as other separately established rates (Rep. 26; R. 30), but held also that consideration must be given to the through rates resulting from the combination of those proportionals with the inbound rates. It is true that a proportional rate is related

[15] *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105-09; *Atchison, T. & S. F. R. Co.* v. *U. S.* (1929), 279 U. S. 768, 776; *Great Northern R. Co.* v. *Sullivan* (1935), 294 U. S. 458, 462; *Cairo Board of Trade* v. *C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350-51. See also "A Study of Proportional Rates" by Charles W. Berry (March, 1943) 10 I. C. C. Pract. Jour. 545.

to the inbound movement since such movement is the condition precedent to the application of that proportional. Further, there may be circumstances relating to the inbound hauls which are relevant under Section 3(4) to the lawfulness of the outbound proportionals. One such circumstance is the point or territory of origin, since it is recognized that proportional rates may vary according to differences in origin. However, that circumstance was ignored by the Commission in fixing the relation of ex-barge proportionals to ex-rail proportionals in this case. The Commission gave no heed to the similarity of origin points as between this appellee and competing connecting rail lines. Rather, it included in the ex-rail side of the comparison circumstances which related to the territories far removed from that served by barge lines. It thus subordinated the circumstances surrounding the transportation of ex-rail grain from barge-line territory.

The Commission did not properly discharge its function when it dealt only with the reasonableness of the aggregate barge-rail through rate and its relation to the aggregate all-rail combination through rate.

B. THE ORDER USES LOCAL RATES AS A STANDARD FOR LAWFUL EX-BARGE RATES WITHOUT REGARD TO SECTION 3(4).

Passing the errors relating to the Commission's consideration of through service on an average basis, in many prior cases cited by the Commission on page 26 of its report (R. 30) it held that Section 3(4) required an absolute equality of rates on traffic received from connecting lines. The Commission in the instant case suggests that such equality is not required if there are differences in circumstances and conditions surrounding the through transportation. (Rep. 26; R. 30) It concluded that when there are differences in average circumstances and con-

ditions surrounding the through services "ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences." (Rep. 22; R. 31-32) All this purports to approach the issue from the standpoint of what would constitute a proper relation between the separately established proportionals. The Commission's findings as to differences dealt with under Point I purport to justify a difference between such proportionals. In other words, the Commission in effect says that we will approve a difference between ex-barge proportionals on the one hand and ex-rail and ex-lake proportions on the other, which will give effect to the differences in conditions found by us.

The ultimate conclusion of the Commission is framed so as to provide that Section 3(4) is not violated as long as the ex-barge rates are no higher in relation to the ex-rail and ex-lake rates than results from the prescribed ex-barge rates when compared with the existing ex-rail and ex-lake rates. (Rep. 32; R. 36) However, it is apparent from the face of the report that the Commission did not in fact measure the approved difference by the differences found in transportation circumstances and conditions. This is made plain by the method used in arriving at the prescribed ex-barge rates—the deduction of specified amounts from corresponding local rates. In effect, the Commission declined to use the ex-rail and ex-lake proportionals, which are the rates and charges assessed on the traffic of connecting lines competing with appellees, as a standard to measure lawful ex-barge rates, allowance being made for differences in conditions.

Those competitive rates were put entirely out of view when the Commission reached the point of fixing lawful ex-barge rates. This fact is not disputed by appellant and it devotes pages 35 to 48 of brief to an attempted justification of this action.

The vice in the method followed by the Commission is that it wholly disregards Section 3(4). The local rates to which the Commission related the ex-barge rates are not the "rates and charges" on the traffic of any connecting line. The requirement of Section 3(4) is not satisfied by relating the charges on traffic from a particular connecting line to the local rate structure; it can only be satisfied by a proper relation between the rates and charges actually applied on traffic proceeding from connecting lines.

There is no rational support for an order which purports to comply with Section 3(4) by fixing ex-barge rates in terms of local rates.

C. THE ORDER TESTS THE RATES BY THEIR EFFECT ON THE MOVEMENT OF TRAFFIC WITHOUT REGARD TO SECTION 3(4).

At page 63 of brief, counsel for the appellant states (emphasis supplied):

> In determining a proper level of proportional rates the Commission set out *the guiding principle* which should govern its ultimate determination. This was *fundamentally the effect on the movement of the traffic* not only from the standpoint of the barge lines should the present ex-barge proportionals be increased, but on the rail lines should the existing ex-barge proportionals be perpetuated, all in the light of the national transportation policy as affecting the various competing relationships. (R. 33)

Here is further evidence that the Commission confused its function under Section 1 of the Act with its function under Section 3(4).

Section 15a(2) of the Act provides (emphasis supplied):

> In the exercise of its power to prescribe *just and reasonable rates* the Commission shall give due consideration, among other factors, to the effect of rates

> on the movement of traffic by the carrier or carriers for which the rates are prescribed; . . .

The proportional rates prescribed in this case apply entirely over the lines of eastern railroads. The Commission should, therefore, give consideration to the effect of those rates on the movement of traffic to the East when it determines what is a reasonable rate for the eastern carrier. However, when the Commission measured the rate relation between competitive connecting carriers by the effect of that relation on the movement of traffic, it acted beyond the limits of its statutory authority. The statute does not give the Commission the power to fix proportional rates so as to force traffic over the line of one connecting inbound carrier in preference to a competing connecting inbound carrier.

The effect of a particular rate relation on the movement of traffic is significant in a Section 3(4) case only to show whether or not the complaining party is damaged by the rate relation. On that point we need not go beyond the Commission's finding that the higher ex-barge proportional rates will cause ex-barge grain to be discounted on the Chicago market, and that a discounted price would make it less advantageous for the grain to move inbound via barge than via rail. (Rep. 16, 17, 23; R. 20, 27, 31)

As to that the Commission made a hypothetical statement in its report as follows (Rep. 29; R. 33-34):

> *If* the rates on the ex-barge traffic are adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto," the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traffics, thus preserving the inherent advantage of barge transportation to the adjacent farm community and all others concerned, without any adverse effect on the wartime stabilization program or the effective use of the waterway.

The test of whether a given rate relation is discriminatory or not is not the fairness of the opportunity to participate in the through traffic. The true test is whether there are differences in relevant circumstances which justify the prescription of the given rate discrepancy. That test was not applied by the Commission. That is not to say that appellee claims a right to a particular rate or to retain or regain certain traffic. Appellant misstates the position of appellee on page 34 of brief, where it is said:

> The barge lines complain that the rates approved by the Commission will result in diversion of traffic from them to the rail lines. That there may be some diversion of traffic is not denied. But their contention assumes that they are entitled under the law to all the traffic they are now carrying and any loss of that traffic as a result of the Commission's order automatically invalidates it. In other words they claim that the present territory from which they now draw traffic—up to 77 miles from the river elevators—is inflexibly tributary to their mode of transportation.

Appellee claims no right to particular traffic as a matter of law. It does claim the right to whatever traffic will be attracted to its line when the proportionals for the movement east of Chicago are properly related to ex-rail and ex-lake proportionals. Whether the amount of traffic lost is great or small has nothing at all to do with the lawfulness of any rate relation under Section 3(4). That relation must depend upon statutory standards; and when statutory standards are observed in fixing the relation, it is of no consequence that traffic is either lost or gained by the lines involved.

Finally, appellant concludes (pp. 49-50) "that it is difficult to find a discrimination against the barge-rail service as a whole" because the combination barge-rail rates are less than the combination all-rail rates. The answer to that observation is that Section 3(4) does not

deal with a difference between barge-rail and all-rail rates. It prohibits discrimination in rates between connecting carriers. Such discrimination is unlawful, even though the barge-rail combination remains less than all-rail, unless it is warranted by transportation circumstances. The Commission failed to find such circumstance, but arbitrarily approved the discrimination.

III. The lower court did not transgress on the administrative domain, but held that the Commission committed an error of law in its interpretation of Section 3(4).

The complaint in this suit calls for judicial review of an order of the Commission which approved a rate relationship as lawful under Section 3(4) of the Act. In reviewing such an order, this Court should not substitute its judgment upon any question which Congress has committed to the Commission for determination. It should ascertain only whether the Commission acted within the powers conferred upon it by the statute, and correctly applied the rules of law. Appellees have raised no question as to the weight to be given the evidence or as to the conclusions to be drawn therefrom. We accept as final all of the findings of the Commission upon the facts and deal only with the sufficiency of the report on its face. Appellees do insist that the facts upon which the Commission based its conclusions are legally irrelevant under a proper construction of the statute and that the Commission's findings do not therefore support its order as a matter of law.

Appellant asserts that the lower court exceeded its function in entering a comprehensive series of findings of fact which clearly set forth the circumstances involved in the proceeding. However, appellant makes no specification of error in any finding of the lower court. They are brushed aside with the following statement (pp. 57-58):

Categorically to reply to all the detailed findings, criticisms, and argument employed by the court below to sustain its judgment would unduly prolong this brief. We submit that a careful study of the Commission's report demonstrates their fallacy.

Similarly, in its Assignments of Error Nos. 7 to 27 (R. 211-13), appellant asserts that the District Court erred in failing to give effect to certain findings of the Commission and in holding that certain findings were without pertinency. In its brief these assignments are listed collectively in paragraph 2 of the assigned errors to be urged. Yet in the argument portion of its brief, appellant does not in fact urge the errors assigned.

It is true that the lower court entered comprehensive and detailed findings of fact, upon which it entered its final decree. In so doing, we submit, the court did no more than it was required to do in examining the report of the Commission to determine whether the findings contained therein were sufficient to support the order. However, if we assume what we do not admit, that the court based its decree in part upon grounds which were beyond the proper scope of judicial review, that error would not be grounds for reversal of the decree, provided there are other and good grounds for setting aside the order. This court has held that on appeal it will confine its review to the grounds upon which the Commission itself based its action and will affirm the decision of the lower court even though the lower court relied upon a wrong ground or gave a wrong reason for its decision. *Securities and Exchange v. Chenery Corp.*, 318 U.S. 80, 88.

The lower court in essence decided that in passing upon the rates in question the Commission was bound to observe and apply the provisions of Section 3(4), and that it had failed to do so. (R. 205) The court properly condemned

the order because there had been a "departure from the statutory standard," *United States* v. *Missouri P. R. Co.*, 278 U.S. 269.

Counsel for the appellant states that the fundamental error of the court below was "in viewing the outbound movement as a single, independent, and unrelated shipment." (p. 50) That the lower court did not so view the case is plain from its findings and conclusion. The lower court did find that the Commission exceeded its authority because the differentiating circumstances found by it were either contradicted on the face of the report or were insufficient in law to support the rate discrepancies prescribed and approved. The court carefully reviewed all the circumstances considered by the Commission, but held that such circumstances were not legally relevant to the issue under Section 3(4). It concluded that an order based thereon is invalid.

This Court has many times set aside an order of the Commission for reasons that were identical in principle with those which persuaded the lower court in this case. Commission orders have been condemned wherever based upon findings of facts which were not relevant as a matter of law. *Southern P. Co.* v. *Interstate Commerce Com.*, 219 U.S. 433; *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658, 666. The same principle applies conversely where, as here, the Commission fails to consider facts which are relevant as a matter of law. *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U.S. 144; *American Trucking Asso.* v. *United States*, 326 U.S. 77. An order should be set aside when not supported by adequate findings and when the findings entered provide no rational basis for the ultimate conclusion. *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454; *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475; *Eastern-Central M. C. Asso.* v. *United States*,

321 U.S. 194. An order which shows an abuse of discretion should be set aside. *Mitchell* v. *United States*, 313 U.S. 80; *Southern P. Co.* v. *Interstate Commerce Com.*, 219 U.S. 433. Finally, the Commission here applied an erroneous construction of Section 3(4) of the statute and failed to extend to this appellee the protection required thereby. For that reason the lower court properly set aside the order. *United States* v. *Missouri P. R. Co.*, 278 U.S. 269.

IV. The order of the Commission is not supported by the prior decision in Interstate Commerce Commission v. Inland Waterways Corp.

The brief of appellant contains several references to the decision of this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, in which this Court refused to set aside a previous order of the Commission entered in this proceeding. In effect, appellant relies upon that decision as supporting the present order of the Commission which was entered after further hearing. There are several reasons why that decision does not support the order now before the Court. Nor does it support the manner in which the Commission applied Section 3(4) of the Act and the National Transportation Policy to the particular circumstances which it found on further hearing.

1. In the prior case in this Court, the assailed order of the Commission merely vacated its suspension of a railroad proposal to discontinue application of the ex-rail proportionals to ex-barge grain. Appellee contended that this was the equivalent of Commission approval and prescription of the full local rates for application on ex-barge grain. This Court held, however, that the Commission did not find that the local rate proposed by the respondents

would be lawful insofar as discrimination under Section 3(4) was concerned. (319 U.S. 671, 685)

Since that decision, the Commission has reheard the case upon the specific issue as to "what would be reasonable and otherwise lawful proportional or reshipping rates" for application to ex-barge traffic. (Rep. 9; R. 12) Throughout its report the Commission refers to the rates approved by its order as "prescribed rates." And the ultimate finding of the Commission in the present report is that the relation of the prescribed ex-barge rates to the present ex-rail and ex-lake proportionals will be nondiscriminatory and lawful under Section 3(4). (Rep. 32; R. 36) In other words, on this appeal the Court is confronted for the first time with an order of the Commission prescribing proportional rates for ex-barge grain and approving under Section 3(4) the relation between those rates and the rates applied on ex-lake and ex-rail grain.

2. In the initial proceedings both the Commission and the Court stated that it was the contention of this appellee that it was entitled, as a matter of law, to the continuation of the existing adjustment, and that Section 3(4) prohibited any difference in rates as between connecting carriers, regardless of differentiating circumstances which might be found. As the Court phrased it (319 U.S. 671, 691): Appellees "relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure." That cannot be said of the position of appellees in the case now before the Court.

The above quoted statement of the Court had to do with the following situation, which existed at the time of the decision but which does not exist now. In the prior proceedings before the Commission this appellee sought only the cancellation of the railroad proposal so as to

continue in effect the existing proportionals. Under the schedules in effect, the tariffs were and are so phrased as to provide the Northwest basis on ex-barge grain from Illinois when reshipped to central territory destinations. This was a truly fortuitous situation, and the Court correctly noted the difference in the factual circumstances surrounding ex-barge grain from Illinois, as compared with ex-rail grain from the Northwest, and held that those differences could control. The Court said at page 688:

> . . . To sustain the injunction would require a holding that grain originating 60 miles from Chicago must as a matter of law be given the benefit of proportionals fixed with reference to grain from the Northwest Territory, embracing points in Canada and as far west in the United States as Washington and the Dakotas. In addition to the disparity in distances, there is the further fact that the grain from the Northwest is predominately wheat, while that from the territory served by the barge lines is predominately corn from Illinois. Nothing in the Interstate Commerce Act as amended by the Transportation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

With that statement there can be, and is, no disagreement.

In addition to the foregoing both the Court and the Commission labored under a misapprehension that the same fortuitous circumstance was true as to the ex-barge grain from Kansas City, in which this appellee is interested. (319 U.S. 671, 675) In the report now before the Court, the Commission correctly finds that ex-barge grain from Kansas City presently takes the identical proportional rate basis applicable on ex-rail grain from Kansas

City. It takes the Trans-Mississippi proportional and not the Northwest proportional. (Rep. 15, 20; R. 16, 24)

Counsel for the appellant would have the Court believe that appellees still seek a continuation of the Northwest proportional on Illinois ex-barge grain when reshipped to central territory; it is so stated at page 35 of appellant's brief. That is not true. The barge-line appellees on further hearing sought from the Commission a parity with proportionals applied to ex-rail grain *from the same origin.* They sought the ex-Illinois basis on Illinois grain and the Trans-Mississippi basis on Kansas City grain. (Rep. 24; R. 28)

In other words, the Commission was not asked to treat as legally identical such widely disparate factual situations as exist between Northwest grain and Illinois grain. It was asked to treat ex-barge grain from Illinois the same as ex-rail grain from Illinois in view of the identical situations as to all circumstances relevant to the lawfulness of the rate relations. (Rep. 24; R. 28) The contention of appellees now before this Court is not that they are entitled, as a matter of law, to the present proportionals. The contention is that the Commission failed to follow statutory standards in arriving at the rate relation (ex-barge compared with ex-lake and ex-rail) that is approved and prescribed by its report and order.

3. In its first report, the Commission relied heavily upon the fact that the existing barge-rail rate from Illinois provided through barge-rail rates less than the local rates from Chicago, and held that this was a violation of Section 4(1) of the Act. This Court emphasized that circumstance in its prior decision (319 U.S. 671, 677), and presumably referred thereto when it used the phrase "unlawful benefits." This proposition has been taken out of the case by the current order of the Commission. In

the report now before the Court the Commission finds that a combination through rate made up of an inbound barge factor and an outbound rail proportional is not unlawful under Section 4, even though it is lower than the local rate for the all-rail service from the reshipping point to the same destination. (Rep. 30; R. 34-35)

The only real similarity between the two cases is that the same carriers are involved and it is the same grain traffic. The rates involved are not the same, because in the report now before the Court the Commission for the first time prescribed rates for application on the ex-barge traffic and approved the relation between those rates and the ex-rail rates. In so doing, the Commission undertook to specify certain factual differences as supporting its order. The question presented on this appeal is whether the differences so found provide a rational basis for that order. No such question was before the Court in the prior case, and it follows that nothing held by this Court therein can be construed as approving the manner in which the Commission disposed of the case on further hearing.

CONCLUSION.

The court below set aside an order of the Commission which prescribed the proportional rates which the eastern railroads are to charge on traffic handled to the reshipping point by connecting barge lines. The court condemned that order because it approved ex-barge rates higher than the proportionals charged on traffic handled for connecting rail lines without any findings as to transportation circumstances and conditions, such as would warrant that relationship under statutory standards.

In this brief we have shown that the decision of the lower court was correct. Most of the circumstances found

by the Commission are not points of difference between ex-barge and ex-rail traffic, but are points of similarity, and the Commission did not find to the contrary. As to the differences the Commission did find between ex-barge and ex-grain traffic, none of those differences is legally relevant under the provisions of Section 3(4) of the Act.

When the many details of the case are boiled down to the essential facts, it therefore stands out that the Commission has exceeded its authority. It has failed to conform to the statutory standards. It has authorized the Pennsylvania Railroad to charge more on grain brought from Kansas City to Chicago by the Federal Barge Lines than on grain brought from Kansas City to Chicago by the Alton Railroad, even though it performs precisely the same service in either case, and even though each of the two connecting carriers brings the grain from the same origin and interchanges with the Pennsylvania Railroad under the same circumstances and conditions. We respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A.

National Transportation Policy

(Title 49 U.S.C.)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Transportation Act of 1940

(Title 49, U.S.C., sec. 4, note)

Sec. 6(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of

this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application.

INTERSTATE COMMERCE ACT

(Title 49, U.S.C.)

Sec. 3(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Sec. 4(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included

within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Sec. 15a(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 72

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN BEHALF OF APPELLEE, A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE.

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OPINIONS BELOW.

The specially constituted District Court wrote no opinion. Its findings of fact and conclusions of law (R. 177-207) have not been reported. The report of the Interstate Commerce Commission (R. 10-49) appears at 262 I.C.C. 7. It incorporates previous reports of the Commission, found respectively at 246 I.C.C. 353 and 248 I.C.C. 307.

JURISDICTION.

The final decree of the District Court was entered November 26, 1945. (R. 207-209) The petition for appeal was filed and allowed on January 24, 1946. (R. 209-210; 214-215) The Jurisdiction of the Court depends on Section 210 of the Judicial Code, 36 Stat. 1120, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U.S.C.A. 479), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C.A. 345). Probable jurisdiction was noted by this Court on April 29, 1946.

STATUTE INVOLVED.

Relevant provisions of the Interstate Commerce Act are shown in the Appendix hereof.

QUESTIONS PRESENTED.

For their service in taking grain east from Chicago, the eastern rails have for many years charged reshipping rates (lower than local rates) regardless of whether the grain came to Chicago by rail, by lake steamer, or by barge reaching Chicago via the Illinois Waterway.

By the order complained of the Commission prescribed that rail reshipping rates for transporting east from Chicago, any grain that shall have arrived in Chicago by barge, shall be higher than those charged on any grain that shall have arrived in Chicago by rail or lake steamer —uniformly higher by three cents a hundred pounds to all the most important eastern destinations, and by varying amounts to most of the less important destinations.

The specially constituted District Court enjoined the order.

Did the Commission err in prescribing such higher reshipping rates on all ex-barge grain than on any ex-rail or ex-lake grain?

Did the Commission, in so prescribing that said reshipping rates on all ex-barge grain shall be higher than the reshipping rates from Chicago on any ex-rail or ex-lake grain, misconstrue and misapply criteria and requirements of the Interstate Commerce Act, as amended by the Transportation Act of 1940?

Did the Commission, in so prescribing that rail reshipping rates east from Chicago shall be thus unfavorable to ex-barge traffic, and thus favorable to ex-rail and ex-lake traffic, make findings of fact that support its conclusion that such prescribed differences of rate treatment are lawful under Section 2, or Section 3(4), of the Interstate Commerce Act, as amended by the Transportation Act of 1940?

Did the Commission make findings of fact that rationally relate the record before it, under criteria for its action prescribed by the Interstate Commerce Act, to its conclusion that, the eastern railroads may lawfully exact such higher reshipping rates for transporting east from Chicago grain that shall have arrived there by barge, while exacting only such lower reshipping rates for transporting east from Chicago the grain that shall have arrived there by rail or by lake?

Did the Commission in so prescribing that the reshipping rates east from Chicago shall be thus unfavorable to ex-barge traffic, and favorable to ex-rail (and ex-lake) traffic, misconstrue, and apply a misconstruction of, the requirement of the National Transportation Policy that the inherent advantages of each form of transportation shall be recognized and preserved?

Did the Commission, in so prescribing that rail reshipping rates east from Chicago shall be thus unfavorable to ex-barge traffic, and thus favorable to ex-rail and ex-lake traffic, consider as warranting said result matters that do not warrant it, that the Commission had no right in law to consider to warrant it, and matters which afford no rational basis therefor?

If so, did the Commission, in acting on said idea, standard, or criterion of its own, (a) preserve the inherent low cost advantage of water transportation; (b) overhaul a judgment as to what is desirable that had been made by Congress, contrary to a statutory mandate enacted by the National Transportation Policy that was binding on the Commission in its administration of all sections of the Interstate Commerce Act; (c) attempt to "equalize" natural economic advantages, fortunes and opportunities?

SUMMARY OF ARGUMENT.

I.

By its order the Commission sought to equalize natural economic advantages, fortunes and opportunities which is beyond its jurisdiction.

The rates increased are those of the eastern railroads.

There is no finding that the present reshipping rates eastbound from Chicago are unreasonable.

The present barge rates into Chicago are expressly found to be reasonable.

There is no finding that the present combination rates —resulting from the sum of the present barge rates into Chicago and the present reshipping rates eastbound—are unreasonable.

It would have been the Commission's duty to order a change if any rates had been found unreasonable and it ordered none, but left the making of any change to the option of the eastern railroads.

There is no finding that any rate whatever was unreasonable as it existed before the order.

The Commission's findings show that farmers and river elevators so located as to be accessible to low cost water transportation have a natural advantage from location; that inland farmers not accessible to the waterway get for their crop what they would receive if there were no water transportation; but that elevators at rail locations in Illinois which cannot accumulate so much grain—because they cannot pay the farmer so much for his crop as the river elevator—are asking that rail rates be reduced.

The purpose of the present order is expressly stated to be to meet the desire of elevator operators at rail origins in Illinois.

The means adopted is to increase barge-rail combinations.

For a reduced differential between their all rail rates and water rail rates.

The purpose is to equalize the natural advantage of those having access to low cost transportation with the situation of those who do not.

The Interstate Commerce Commission was never given such power.

By the Transportation Act of 1940 the exercise of such power for the purpose involved was prohibited.

II.

The findings of the Commission do not support its order under the sections of the Interstate Commerce Act that forbid intercarrier rate discrimination.

The present report prescribes a discrimination. It is not predicated on the finding of the unreasonableness of any existing rate—whether the present reshipping rate of the eastern railroads, the incoming rates of the barge lines to Chicago, or the incoming rates of the western railroads to Chicago.

The present report is not predicated on a finding of the unreasonableness of any existing rate.

If a change were required to bring about reasonable rates the Commission would have required such change, but it required none.

The fact that the combination barge-rail rates resulting from the new reshipping rates eastbound from Chicago

may be reasonable is irrelevant to the fact that they are discriminatory.

The Interstate Commerce Commission by confession undertook to assimilate the applicable tests as to inter-carrier rate discrimination prescribed by Section 2 and Section 3(4) to the statutory tests of Section 3(1) which the Transportation Act of 1940 prohibited.

The findings of the Commission do not support its conclusion under Section 2 or Section 3(4).

Under the National Transportation Policy the Commission has a mandate to preserve the inherent advantages of all forms of water transportation.

The inherent advantage of water transportation is its low cost.

In exercising the asserted right to curtail the inherent low cost advantage of water transportation, the Commission resorted to standards which were forbidden, failed to make findings supporting its order under the applicable standards, and misinterpreted Section 6(b) of the Transportation Act of 1940 as only directing *it* not to require increases in established rail rates under the long-and-short haul clause, whereas Section 6(b) provides that the *long-and-short haul clause* shall not require changes in established rail rates and the Commission by permitting such a change because of the long-and-short haul clause has allowed the long-and-short haul clause to require the result reached.

STATEMENT.

The Established Rates and the Traffic.

Grain[1] comes to Chicago[2] by rail, by lake steamer, and by barge on the inland waterways.

After coming to Chicago this grain moves on east from Chicago by rail. (246 I.C.C. 353, 383-4; R. 48, 179.) Part of it goes east by lake during the seven months of open lake navigation. (Idem.)

The record shows in tabular form the quantities moving into and then out of Chicago, and the modes of transportation employed for the in-movement and the on-movement (246 I.C.C. 353, Appendix I; R. 47, 179) as to corn, wheat, oats and soybeans.

The rates in question are the rail rates for the movement of grain east from Chicago.[3] The established rail rates for the on-movement from Chicago include two general kinds of rates, "local" and "proportional." The *local* rates are in all cases *higher* than the proportional. These "proportional" or "reshipping rates" (lower than "local" rates) apply on grain that has been transported into Chicago. They apply to the on-movement east from Chicago.

The Chicago elevators receive this grain as it comes in by rail, by lake steamer, and by river barge. From the Chicago elevators it goes east. (R. 180)

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[1] "Grain" as used herein means the various kinds of grain, grain products and soy beans.

[2] Other reshipping points in the Chicago region are involved. Chicago dwarfs the rest and was treated by the Commission as fully representative. Chicago is one of the great grain reshipping points of the world. (246 I.C.C. on 383-4.)

[3] R. 36, 49, 184, 185.

By far the most important destinations for this grain lie east of Buffalo and Pittsburgh in what is called New England and Trunk Line Territory. (R. 18, 180, 181.)

For many years the reshipping rates from Chicago to New England and Trunk Line Territory have been the same, whether the grain arrived by rail, lake, or barge and regardless of origin.[4]

In order to engage the proportional (lower) rate level for movement east from Chicago, it is not required that the identical kernels of inbound grain be identified; the grain is all mingled in the elevators. It is required in order to engage the proportional rate for outbound shipment that the shipper shall show and surrender to a policing agency (called the Central Weighing and Inspection Bureau) inbound billing covering an equivalent amount of grain of the same kind that he is shipping east. This is true of grain that has come to Chicago by rail, barge or lake steamer.

The Proposed Change in Rates.

In this situation eastern railroads transporting grain east from Chicago proposed to change the established rail rates for the on-haul of grain that had been brought to Chicago. The nature of the change lay on the face of the schedules. It was stated by Commissioner Alldredge when the case was before Division 2 of the Commission:

> "If the suspended schedules should become effective the situation would then be that the present proportional rates would continue in effect on grain brought to Chicago by rail and by lake vessel, but the higher local rates would apply on grain brought in by barge over the Illinois waterways." (246 I.C.C. 353, 382; R. 18.)

[4] 262 I.C.C. 7, 12; R. 16, 191. For reshipping rates to the less important destinations intervening between Chicago and Buffalo, see Record 181, note 10.

This was also the finding of the Commission, which referred to

> "* * * the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates although in each instance the physical carriage beyond the reshipping point will be substantially the same." (248 I.C.C. 307, 311.)

Congress has spent millions in the improvement of our inland waterway system for navigation.[5]

On the Illinois River and Waterway alone, the investment of public money is about $60,000,000. (246 I.C.C. 353, 355.) River navigation for such cargo is by means of strings of barges moved by towboats. This elimination of navigation difficulties has made barge transportation of grain to Chicago commercially important. (Appendix 1 of the report of Division 2; 246 I.C.C. 353, 358.)

The barge rates into Chicago are lower than the rail rates. The result is that farm producers having access to river transportation get more for their grain.[6] One of the inherent advantages of water transport is low cost.[7] The benefit of low cost river transportation goes to the grain

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[5] These appropriations have been made over a period of years by Public Acts of Congress of which this court has judicial knowledge.

[6] The further he is from the river, the less the advantage to the farmer, as increasing distance is reflected in higher trucking cost to the river bank elevator. "The primary interest of the Illinois farmer having access to the waterway is the greater net price above referred to. The barge lines and the waterway elevator operators and dealers are primarily concerned with the volume of traffic moving through their facilities." (262 I. C. C. 7, 24; R. 186-187.)

[7] Cf. legislative history of the Transportation Act of 1940, hereinafter mentioned. The Inland Waterway Corporation was formed by Congress to develop low cost river transportation for the benefit of the public.

producer in the country. The Chicago buyer gets none of it. He pays the Chicago price, less the cost of getting the grain to Chicago, however it may come.[8]

The proposal was, as stated, to give, or withhold, the benefit of proportional rates going out of Chicago, depending on whether the grain comes in to Chicago by barge, or by rail.

The eastern lines who proposed this change in the established rate structure for the movement of grain east from Chicago put only one witness on the stand. (W. T. Tannehill.) He was cross-examined as to the reason why the railroads proposed the change in their rates, and left the subject here:

> "We made this proposal as I have stated several times, and filed these tariffs with the hope that we could drive this business off the water and back onto the rails where it belongs. * * *" (248 I.C.C. 307, 327; R. 195, N. 32.)

Upon petition of various parties the Commission exercised its powers under Section 15 of the Interstate Commerce Act and ordered a hearing on the proposed new rates.

Initially the case came before Division 2 consisting of three commissioners, two of whom joined in a report most of which is devoted to an argument to the effect that the established tariffs, properly construed, never had applied to ex-barge grain. The third commissioner dissented and found the proposed schedules to be unlawful. (246 I.C.C. 353.)

The eastern railroads who had made the rate proposal in question asked the full commission to reverse Division

[8] The present report spells this out. 262 I.C.C. 7, 16, 23; R. 16, 23, 186, 187.

2 with respect to the construction of their established schedules and the Commission did so.[9] But the Commission also denied the petitions of shippers and a barge line and held that the proposed schedules abolishing the application in the future of proportional rates to ex-barge grain (while continuing them as to ex-rail and ex-lake grain) "cannot be condemned as unlawful under Sections 2 and 3 of the Act." (248 I.C.C. 307, 311.)

The District Court enjoined the order, understanding it to mean (as the parties had)[10] that the Commission had approved the rail rates proposed. *Cargill, Inc.* v. *United States*, 44 F. Supp. 368 (N.D. Ill. E.D. 1942.) This Court held, however, that the Commission's dismissal of the suspension proceeding under Section 15, involved no approval of the rail rates proposed.

> "Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates, which, under the Commission's decision, leaves them open to possible recovery of reparations."
>
> *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671.

The railroads did not put their proposal into effect. The Commission by order reopened the hearing for further evidence in the same record. (R. 57.)

The Commission held further hearings and found that certain ex-barge reshipping rates would be "*lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein*, under Sections 1, 2, 3(1), 3(4), 6(11)b and 15a(2) of the Interstate Commerce Act, administered with a view to carrying out the

[9] 248 I.C.C. 307, 309, 312 and following.

[10] Cf. Brief for the Commission, p. 4.

national transportation policy" etc., and stated what those "prescribed ex-barge proportionals" shall be. (R. 184, note.) (Our emphasis.)

The meaning of the Commission's action is stated in the District Court's finding 15 (R. 184):

> "To all Eastern Destinations[11] the prescribed reshipping rates on ex-barge grain are uniformly 3 cents higher than the reshipping basis on all ex-rail and ex-lake grain. To Central Territory[12] destinations, except in a relatively few instances, the prescribed reshipping rates on ex-barge grain are higher than the reshipping basis on ex-rail grain from the same origin, and higher than the reshipping basis on ex-lake grain from all origins."

The Commission found nothing unlawful in the long-established situation whereby the ex-barge grain is on a parity for rail transportation east from Chicago with ex-rail and ex-lake grain. It did not require the eastern railroads to change their rates in any way, nor to make effective the rates it had prescribed.[13]

There is, also, considerable discussion in the Commission's reports (on which were entered the said order giving the eastern railroads the right to increase the ex-barge rates, or not, as they saw fit) of the effect of the long-standing parity of reshipping rates on ex-barge, ex-rail and ex-lake grain, as breaking down or "jeopardizing"

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[11] Eastern Destinations—"New England and Trunk Line Territories, which include all territory east of a line drawn northward and southward through Pittsburgh, Pa., and Buffalo, N. Y. north of the Potomac River." (R. 180.) "In this proceeding, the rates to trunk-line and New England Territories are by far the more important, as marketers and processors in central territory can and do transit under such rates." (262 I.C.C. 7, 15; R. 18, 180.)

[12] Central Territory—"Chicago east to said Buffalo Pittsburgh line * * *." (R. 180.)

[13] Cf. *Columbia Broadcasting System* v. *United States*, 326 U. S. 432, 436.

the rail grain rate structure. The former expressions of the Commission on that subject are clear only when closely examined, and the present report elaborates what was meant by them. As to that:

The two commissioners who made the first report in this case[14] point out that, before the eastern rails proposed to increase the rates out of Chicago on ex-barge grain, the western rails who compete with the barge lines for the inbound haul to Chicago, have been publishing intrastate rates applying from some Illinois shipping points accessible to river transportation, which were lower than the interstate rates from the same points. The interstate rates from these water-competitive origin areas, for grain shipment to Chicago, were "said to be (*sic*) the normal basis reflecting the national grain rate structure." The report followed this statement with a table. The table shows those intrastate rail rates to Chicago, lower than the interstate rates. (246 I.C.C. 353, 356.)

The western railroads put in these low intrastate rates (with authority only of state regulatory bodies, which could not authorize transit in interstate commerce) to get the business away from the barge lines, or, in the language of the report, to meet barge line competition. But these low intrastate rates failed of their purpose. Division 2 said:

"*Position of the Western Rail Lines*:

"These lines maintain that the purpose of establishing the intrastate rates on corn, under which

[14] The third (Commissioner Alldredge), dissented, as did the late Joseph B. Eastman when the case reached the Commission. (246 I.C.C. 364; 248 I.C.C. 307.)

transit is prohibited, was to meet unregulated[15] barge competition.

"The practice of respondents[16] in permitting transit and the application of the proportional rates east of Chicago has had the effect of nullifying the western lines' efforts." (246 I.C.C. 353, 364.)

The purpose of the proposal of the eastern lines, which would have left only higher rates applicable on ex-barge grain, was, admittedly, to drive the inbound barge traffic "off the water and back onto the rails."[17]

The report referred later to the breaking down of the grain rate structure, as follows:

> "The western lines, supported by the eastern line respondents, also contend that if application of the proportional rates is to be continued on unregulated ex-barge traffic, the result will be a breaking down of the established through grain rate structure from west to east. The evidence already detailed *with respect to* the inability of the reduced intrastate rates on corn to accomplish their purpose in meeting the competitive barge charges supports this contention." (Our emphasis.) 246 I.C.C. 353, on 365.

When the report speaks of breaking down the grain rate structure by continuing the ex-barge reshipping rates, it here says that in terms of the actual evidence, the thing it is talking about is this behavior of the rails in publishing intrastate rates "said to be" below the interstate rail rate base in order to get the business away from the barge lines. The observation concerning the breaking down of

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[15] The barge carriers were unregulated when the eastern rails first proposed to increase the rates out of Chicago on ex-barge grain. When the report of Division 2 was written they were regulated carriers under Part III of the Interstate Commerce Act, enacted by the Transportation Act of 1940.

[16] The eastern rail lines, who made the proposal to increase the rates on ex-barge grain.

[17] R. 195; see 248 I.C.C. at 321.

the grain rate structure, understood in terms of the evidence and record as stated by the report, is this; that the rails have yielded to the temptation to publish low rail rates in their efforts to eliminate barge competition.

The only way suggested by which such temptation was to be removed from the rails was the way frankly stated by the eastern rails (who originally made the proposal to increase the ex-barge rates out of Chicago, and to whom the present order leaves the option to make its prescribed increased ex-barge rates out of Chicago effective) viz., to "drive the business off the water and back onto the rails." That phenomenon which the prior report called breaking down the (rail) grain rate structure would be eliminated —only to the extent that the barge lines were eliminated from the business.

In the present report the Commission explains what it meant by "the statement in the prior report that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure."

This explanation is found at 262 I.C.C. 7, 20; Record 191-192.

It begins by discussing the barge-rail "combinations" —that is, the sum of the low water rates into Chicago plus the established uniform reshipping rates east—which *combinations* are "generally far below the *local* [rail] rates from Chicago and also lower than the *local* [rail] rates from numerous intermediate origins in central territory, constituting numerous and extreme departures from the long-and-short haul provisions of Section 4," examples of what is meant being given. But the report makes very plain that its conclusions are not predicated, in the slightest degree, on the proposition that these "departures" from Section 4, are violations of any law. It says:

"Under Section 6(b) of the Transportation Act of 1940, respondents are not required to increase their present ex-barge proportionals to bring the barge-rail combinations in harmony with Section 4 principles. * * * Since Section 6(b) of the Transportation Act of 1940 protects the departures in the present adjustment it follows that it will protect any departures of lesser extent, such as those resulting from the rates approved herein." (262 I.C.C. 7, 30-31; Record 195, note 31.)[18]

What, then, is the consideration the Commission is putting forward and explaining in this discussion of breaking down the rail rate structure and Section 4 departures, that are, confessedly, protected by an Act of Congress, and that its prescribed rates do not eliminate anyway? The Commission's discussion of the subject proceeds:

"*The barge-rail rates are far below the all rail rates* from the same and other *Illinois* origins." *This* is an *inequitable situation* giving rise to *requests for reductions in the all-rail rates* from the Illinois and central territory origins, and it is difficult to see, with such extreme disparities, how *such* requests could properly be denied. As shown by Appendix R, Table I, there is a substantial production of corn in central territory. While *the farmers therein did not appear at the hearing to show that they were hurt by this situation;* such evidence was adduced by others *in the same relative position, namely,* the associations of private and farmer cooperative *elevator companies* at numerous *rail origins in Illinois.*"

[18] From its original enactment Section 4 has applied, only, to carriers and rates subject to the Act. (49 U.C.S.A. 4(1).) Prior to the Transportation Act of 1940 the barge rates were not subject to the Interstate Commerce Act, and therefore a barge-rail combination could not be resorted to in order to seek out a departure from Section 4. The 1940 Act, for the first time subjected barge rates to Section 4(1). (Transportation Act of 1940, Section 6(a) amending Section 4(1).) In so doing it specified in Section 4(1)b that this should not require any changes in established rail rates. (Transportation Act of 1940, Section 6(b) amending Section 4(1) of the Interstate Commerce Act.)

The report, as it tells us, did not allow the eastern railroads to increase their established ex-barge rates out of Chicago for the reason that the long-and-short haul clause of Section 4 made the existing rates unlawful. It recognizes that when Congress amended Section 4 of the Interstate Commerce Act by Section 6(a) of the Transportation Act of 1940 to bring water-rail rates, for the first time,[19] under the long-and-short haul clause of Section 4, it also, by Section 6(b) of the same amendment, inhibited this application of the long-and-short haul concept to water rates to require a change in established rail rates. A change in established rail rates is just the result the Commission arrived at. Its view is, that it has observed the mandate of that statute, because its order did not require the eastern railroads to increase their established ex-barge rates, but only permitted them to do so, as they had long wished to do for purposes they did not seek to conceal.[20] The stated basis of its action is that there is "an inequitable situation," namely, that "The barge-rail rates are far below the all-rail rates from the same and other Illinois origins." Further, that "elevator companies at rail origins in Illinois" are in "the same relative position" as farmers in Central Territory (east of Chicago). Then those equities, that move the Commission to action, are not long-and-short haul clause equities. The long and-short haul clause applies only to hauls "over the same line or route." A barge-rail route is not an all-rail route. The "requests for reductions in the all-rail rates" are urged only by "elevator companies at numerous rail origins in Illinois."

The Commission then says:

"This is what is meant by the statement in the prior

[19] When, as the Commission has found to be the case here, there is no "through route or common arrangement."

[20] 248 I.C.C. 307, 327; R. 195, N. 32.

report that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure."

Jeopardy to the all-rail rate structure when stated by the earlier report in terms of the evidence, consisted of reductions in rail rates made by the western railroads to get the business away from the barge lines. That means the same, under the explanation now given, as recognizing requests urged by "elevator companies at numerous rail origins in Illinois" to have their rail rates on the all-rail route reduced. "So far as the rail carriers are concerned, the grain originates at numerous so-called country elevators . . ."[21] in the business of accumulating grain, whose geographical location on the higher rated all-rail route prevents them from accumulating so much grain, because they cannot pay the farm producer so much for his crop as the river elevators that use low-cost water transportation.

"The primary interest of the Illinois farmer is in the greater net price above referred to." (262 I.C.C. 7, 24, R. 187.)

Dealing, in its former report, with the prospective consequences of the 8½ cent rate disadvantage then proposed against ex-barge grain seeking rail reshipment east from Chicago, the Commission said:

"The proposed schedules will not prohibit the movement of barge-rail grain even to trunk-line territory, their principal commercial effect being to reduce the profits of certain Chicago elevator operators." (248 I.C.C. 307, 310.)[22]

That prediction is now expressly withdrawn.[23]

[21] 262 I.C.C. 7, 15; R. 20.

[22] There was dissent, including a careful opinion by the late Joseph B. Eastman. (248 I.C.C. 307, 312)

[23] 262 I.C.C. 7, 25; R. 29.

The finding now is, further, that the elevator charges and dealer's margin at Chicago are the same on ex-rail and ex-barge grain.

> "The elevator charges and dealer's margin at Chicago are the same as on transit rail grain, namely, 1.6 and 2.25 cents, respectively." (262 I.C.C. 7, 23; R. 187.)

(No finding is made as to what *profits* are made out of such charges, or such margin.)

The present finding is, further:

> "The proportionals from Chicago [the reshipping rates here in question] being substantially the same[24] as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billings and to utilize such grain in their hedging operations. The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic." (262 I.C.C. 7, 23; R. 27.)[25]

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[24] They are exactly the same, on ex-barge, ex-rail and ex-lake grain, to all New England and trunk line destinations, as the Commission elsewhere finds, regardless of origin. (R. 16). These are "by far" the more important. (R. 18, 180)

[25] And further:

> "The primary interest of the Illinois farmer having access to the waterway is in the greater net price above referred to. The barge lines and the waterway elevator operators are primarily concerned with the volume of traffic moving through their facilities." (262 I.C.C. 7, 24; R. 27).

Compare Eastman, dissenting from the former report:

> "While it is true, to some extent, that the combination of the barge rate to Chicago plus the local rate eastbound is lower than the combination of the rail rate from the same origin point to Chicago plus the reshipping rate eastbound, this fact will not enable the ex-barge grain to move from Chicago on the local rate, because the benefit of the low barge rate now goes to the farmer and cannot be used by the elevator operator to offset the higher level of the local rates as compared with the reshipping rates." (248 I.C.C. 307, 321.)

Thus the Commission finds that price parity on the Chicago market of ex-barge, ex-rail and ex-lake grain, is the direct consequence of parity in the reshipping rates east from Chicago on each.

The Commission's present prediction as to the effect of the 3 cent reshipping rate disadvantage it prescribes for ex-barge grain eastbound by rail from Chicago, is this:

> "Under the proportionals approved herein on the ex-barge traffic, it may be necessary to accord grain backed by barge billing some discount under the Chicago price, *but certainly there is no reason why such discount should be as great as the increase resulting from such proportionals.*" (Our emphasis.) (262 I.C.C. 7, 29; R. 33, 186-189.) [26]

The farmer, who gets "the Chicago price less the barge rate and applicable costs and margins applicable to such traffic",[27] has less to gain by taking his grain to the river for shipment to Chicago by barge, when the Chicago price on his grain is discounted by anything up to 3 cents because he chose barge transportation instead of rail transportation. To afford him the same incentive the barge lines would have to cut their own rates—expressly found to be reasonable rates.

There is no finding (and no contention) that anything less than 3 cents is *de minimis* in the grain traffic. It is no longer supposed (*ubi supra*) that the Chicago elevator operator will stand the cost of maintaining price parity for ex-barge grain in Chicago (as compared with ex-rail and ex-lake grain) in the face of an unfavorable rate differential of even 3 cents for its reshipment to the east.

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[26] R. 188.

[27] "The barge rates yield fair returns to the carriers and for the purposes of this report may be accepted as reasonable." 262 I.C.C. 7, 19; R. 23.

If it were lawful (as we deny) to force the barge lines to stand it, out of rates expressly found by this report to be fair and reasonable,[28] it is obvious on the face of the report that they could not. The *whole rate* by barge to Chicago, from a third of the origins selected by the present report, was not "so great" as 3 cents.[29] If the barge lines cut rates from these origins by ½ cent (to offset even a ½ cent discount in the Chicago market price of ex-barge grain, resulting from the prescribed reshipping rates east from Chicago) they would be cutting them by a heavy percentage. There is no finding that this carrier would receive a non-confiscatory return, or could stay in the traffic, with such a cut in its rates (rates expressly found to be fair and reasonable as they stand).

On brief, the Commission seeks to put us in the position of claiming that the barge lines are "entitled" to the business.[30] We suppose that as between the barge lines and the western railroads, competing with each other for grain traffic into Chicago from limited rail-and-water competitive origin areas (areas that are limited by the fact that the rivers do not go everywhere, as the railroads do) each is entitled not to be discriminated against in the reshipping rates on its traffic out of Chicago.

The Commission's brief (like its report) is devoted to discussion of the reasonableness of the overall "combination" charge resulting when one adds the low inbound barge rate, to the higher outbound rail rate, now prescribed. As to that, there is no argument that the Commission is unable to fix reasonable rates that are also non-discriminatory. The duty to see that the overall rates

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[28] See note 27.

[29] 262 I.C.C. 7, 40; R. 46.

[30] Cf. Brief for the Commission, p. 34.

are reasonable is not the whole duty of the Commission. It describes what it did:

> "On further hearing:
> * * * * *
> "2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein, * * * will be those * * * which are no *less favorable to the ex-barge traffic* and no *more favorable to the ex-rail and ex-lake traffic* than is represented by" etc., etc. (R. 36, 184 and note.)

It is those rates that, under the formula then set forth, are admittedly, prescribed 3 cents higher on ex-barge grain to the most important eastern destinations, than on any ex-rail or ex-lake grain whatever.[31]

The Commission prescribed continued reshipping rate parity from Chicago to all New England Trunk Line destinations as to ex-lake wheat (from the Dakotas) and ex-rail corn (from Illinois). These were described in the opinion in the former case as widely disparate factual situations.[32]

The Commission destroyed reshipping rate parity from Chicago to all New England and trunk line destinations as to ex-rail corn from Illinois, and ex-barge corn from Illinois.[32a]

Findings of the Commission are:

> "In this proceeding the rates to Trunk-line and New

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[31] *Atchison, T. & S. F. Ry. Co.*, 279 U. S. 768, 771, 776.

[32] Cf. the quotation in the report (262 I.C.C. 7, 31) from the opinion in the former case (*Interstate Commerce Commission* v. *United States*, 319 U. S. 671, 688) wherein it was held that the Commission was not bound to treat as identical "such widely disparate factual situations."

[32a] This Appellee brings many kinds of grain to Chicago, corn predominating, from Illinois origins. (250 I.C.C. 77; R. 4.)

England territories are by far the more important, as marketers and processers in central territory can and do transit under such rates."

(262 I.C.C. 7, 15; R. 18.)

• • •

"To trunk-line and New England territories the proportionals from Chicago and other gateways are uniform regardless of origin."

(262 I.C.C. 7, 12; R. 16.)

• • •

"The all-rail adjustment by providing for proportionals on out-bound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assists them in maintaining a common price, thus facilitating hedging and other market operations."

(262 I.C.C. 7, 17; R. 21.)

• • •

"The proportionals from Chicago being substantially the same as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billings and to utilize such grain in their hedging operations."

(262 I.C.C. 7, 23; R. 27, 189.)

• • •

As to ex-lake grain:

"Even this small volume is attracted to Chicago under its present ex-lake proportionals only because dealers there can use grain backed by lake billing without discount in their marketing and hedging operations, and as such proportionals apply to and through points in central territory, dealers and processors may ship their grain or products at the out-bound balance of the proportionals to trunk line and New England territories."

(262 I.C.C. 7, 18; R. 22.)

• • •

"Lake-rail grain from the Northwest does not have to move via Chicago."

(262 I.C.C. 7, 18; R. 22.)

• • •

"As to the ex-lake rates from Chicago, that these do not adversely affect those interested in the barge-rail traffic via Chicago is shown by the fact that if such ex-lake rates were increased, *lake* grain from the northwest would continue to flow to the Lake Erie and Hudson River *ports* and those interested in the barge-rail traffic via Chicago would be no better off than before."

(262 I.C.C. 7, 29; R. 33.)

• • •

When the former case was here (*Inland Waterways Corporation* v. *U. S.*, 319 U.S. 671) the denial of appellee's attempt to appear before the Commission (319 U.S. on 682) had left him in the position of merely objecting to the proposal of the eastern railroads (319 U.S. on 687), a proposal whose own shortcomings were then defended by its advocates chiefly on a peculiarity of existing reshipping rates to *Central* Territory.[33] (319 U.S. on 674-675.) The case had been developed before the Commission upon the proposition that the rates proposed by the eastern railroads must stand or fall in their entirety. (319 U.S. on 687.) Appellee's petition to reopen the hearing asked the Commission to exercise all its powers. (R. 54.) This and similar petitions of others were granted by the Commission, the petitions being treated as complaints. (R. 56.) Reference is made to the opinion of Commissioners Alldredge and Lee, at the conclusion of the reopened hearing. (262 I.C.C. 7, 34; R. 38-40.)

[33] Also sometimes called "Central Freight Association Territory," or "C.F.A.," as at R. 40.

Appellee A. L. Mechling, Doing Business Under the Trade Name and Style of A. L. Mechling Barge Line.

Appellee is in the business of bringing various kinds of grain and soy beans to Chicago by barge via the Illinois Waterway from points on the Mississippi River between and including New Madrid, Missouri, and Burlington, Iowa, and also from intermediate origins including Illinois origins.

In collateral proceedings appellee has been issued a certificate of public convenience and necessity to operate as a common carrier of all kinds of grain and soy beans and is a common carrier by water subject to Part III of the Interstate Commerce Act. *A. L. Mechling Common Carrier Application*, 250 I.C.C. 77. (R. 14,) This certificate was issued under the "grandfather clause" of the Transportation Act of 1940, providing in substance that operation prior to January 1, 1940, was conclusive that appellee's operations served public convenience and necessity. (309(a).) Appellee's certificate as a common carrier subject to Part III of the Interstate Commerce Act was later extended on a finding of public convenience and necessity, to include such Trans-Mississippi origins, as St. Louis, Missouri, and Burlington, Iowa. *A. L. Mechling Common Carrier Application*, 250 I.C.C. 205. (R. 14.)

Grain arriving by barge in Chicago is marketed but not processed there. (R. 26, 180.) The railroads maintain switching rates from the river receiving elevators at Chicago to the Chicago processors ranging from 3.25 to 4.05 cents per hundred pounds. (R. 27, 180.)

If grain is to come to Chicago by barge it must find escape to the east.

ARGUMENT.

I.

By Its Order the Commission Sought to Equalize Natural Economic Advantages, Fortunes and Opportunities Which Is Beyond Its Jurisdiction.

The rates increased are those of the eastern railroads. There is no finding that the eastern railroads are in need of additional revenues nor that the present reshipping rates eastbound from Chicago are unreasonable. The barge rates into Chicago are expressly found to be reasonable. There is no finding that the present combination rates—resulting from the sum of the present barge rates into Chicago and the present reshipping rates eastbound—are unreasonable. The Commission ordered no change, as would have been its duty had they been found unreasonable, but left the making of any change to the option of the eastern railroads.

There was in the Commission's order prescribing a rate disadvantage on ex-barge grain seeking rail reshipment eastbound from Chicago, the thought and purpose that thereby it would reduce natural economic advantage and opportunity accruing to those who have, through their geographic location, access to low-cost barge transportation into Chicago—in order somewhat to equalize that advantageous and fortunate economic situation with that of others, whose geographic location is, in that respect, less advantageous.

There seems to be no other way to read the passage (R. 24) describing the fact that barge-rail rates are far

below the all-rail rates from the same and other Illinois origins and declaring this to be an inequitable situation, particularly in view of the further assertion there made that, in respect of the equities so arising, elevators at rail origins in Illinois are in the same relative situation as farmers in Central Territory—who make no complaints for themselves. This is stated to be the meaning both of jeopardy to the all-rail rate structure and of long-and-short haul clause equities (R. 24) and under one or both forms it appears again and again in the reports on the case.

The concession of the report that the rate disadvantage which it prescribes on ex-barge grain is such that it may be necessary to accord ex-barge grain some discount under the Chicago price—but not a discount as great as the increases resulting from the prescribed proportionals —should be sufficient to show that the Commission at least anticipates that its order will have the effect referred to. (R. 33.) Indeed, its extensive findings showing that price parity on the Chicago market is conditioned on rail rate parity eastbound from Chicago to the more important destinations, seem to leave room for no other rational conclusion. None other is stated.

We submit that the vice which has led courts to condemn the attempt to equalize fortunes and opportunities by rate adjustments appears in this order in a high degree. The findings of the Commission demonstrate that the Illinois farmer receives for his crop the Chicago market price, less the cost of getting the crop to Chicago; that when it goes by rail the deduction from the price received by the farmer is the cost of rail transportation and its incidental services, whereas when it goes by barge there is deducted only the lower cost of

barge transportation and its incidental services. (R. 26-27, 186-188.) Under such circumstances the farmer whose location confines him to all-rail transportation into Chicago receives just what he would get if there were no waterway. But elevators at rail locations in Illinois will be able to accumulate less grain because they cannot pay the farmer so much for his crop. Their disadvantage arises from their location on the rail lines and the attempt to equalize their situation with that of the more advantageously located elevator on the river accomplishes that equalization by *pro tanto* destroying a natural economic advantage (which is also a natural resource). That cannot be contended to be within the scope of the intent of the Interstate Commerce Act in conferring powers upon the Interstate Commerce Commission under any section thereof. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46; *So. Pacific* v. *Interstate Commerce Commission*, 219 U.S. 433, 441, 449; *Ashland Fire Brick Case*, 22 I.C.C. 115, 121; *United States* v. *Chicago M. & St. P. R. Co.*, 294 U.S. 499, 507.

Since the natural fortune and opportunity concerned is accessibility to low cost water transportation, the attempt to equalize it with that of others less fortunately situated in that respect, would seem not only to fall outside any powers ever given the Commission but to be—since the Transportation Act of 1940—affirmatively prohibited.

II.

The Findings of the Commission Do Not Support Its Order Under the Sections of the Interstate Commerce Act that Forbid Intercarrier Rate Discrimination.

The Commission has prescribed a rate discrimination that is against the barge lines and their traffic in favor of the rail (and lake) lines and their traffic. The rates prescribed are rail rates for the on-haul from Chicago; they are prescribed to be higher on all ex-barge grain and lower on all ex-rail (and ex-lake) grain.

Its report is not based on any finding that the present "through barge-rail" rates are unreasonable. If they were outside the zone of reasonableness, in either direction, it would have been the Commission's duty to require a change, and it does not, but leaves any change to the option of the easter railroads. Imperative mandates of the Act required the Commission to fix the rates which it did fix—eastbound from Chicago—so that they did not discriminate between connecting carriers, including these common carriers by water (Section 3(4)) and so that no higher charge would be demanded for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." (Section 2.)

That a rate is reasonable (under Section 1) does not control the answer to the question whether it is discriminatory (Section 3(4)) or unjustly discriminatory (Section 2).

Interstate Commerce Commission v. *B. & O. R. R. Co.*, 145 U.S. 263, 277.

American Express Co. v. *So. Dakota ex rel. etc.*, 244 U.S. 617, 624.

U. S. v. *I. C. R. R. Co.*, 263 U.S. 515, 524.

Inland Waterways Corp. v. *U. S.*, 319 U.S. 671.

The Transportation Act of 1940 amended Section 3(1) of the Interstate Commerce Act so as to prohibit applying the latitudinarian tests of undue prejudice against persons and localities "to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description."[1]

In 1915 the Interstate Commerce Commission applied Section 2 of the Act in the leading case of *Chattanooga Packet Co.* v. *I. C. R. R. Co.*, 33 I.C.C. 384 (by the entire Commission) to a situation in which a defendant rail line undertook to restrict its proportional rates against ex-water traffic. The Commission said (p. 392):

> "The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The 'like circumstances and conditions' referred to in Section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight* v. *U. S.*, 167 U.S. 512; *I.C.C.* v. *A.M.R.R. Co.*, 168 U.S. 144. The shippers who desire to avail themselves of the water-and-rail route must be given equal treatment with those who ship all-rail. Any discrimination which exists must not exceed that which is warranted by the differences in circumstances and conditions *of the haul over defendant's lines.*"

Further (p. 393):

> "We are of the opinion and find that, by restricting their proportional rates to traffic routed over their southern rail connections, defendants are unjustly discriminating against complainant and against shippers who desire to route their goods over complainant's boat line."

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[1] The Transportation Act of 1940, Section 5(a)(1); 54 Stat. 902, amending Section 3(1) of the Interstate Commerce Act; 41 Stat. 479, see 24 Stat. 380; 49 U.S.C.A. 31, 49 U.S.C.A. 31 (Supplement).

See *accord*:

Raw Sugar, New Orleans to Gramercy and Reserve La. (1935), 206 I.C.C. 231.

Bascom Co. v. *A. T. & S. F. Ry. Co.*, 17 I.C.C. 354.

Rosenbaum Bros. v. *L. & N. R. R. Co.*, 22 I.C.C. 62.

Birkett Mills v. *D. L. & W. R. R. Co.*, 123 I.C.C. 63.

Ex-River Grain and Products to Mississippi Valley, 177 I.C.C. 206.

Restriction of Proportional Rates, 161 I.C.C. 113.

The decision of this court cited by the Commission in the opinion above quoted is *Wight* v. *U. S.*, 167 U.S. 512, 518. Other cases are *I.C.C.* v. *Delaware L. & W. R. Co.*, 220 U.S. 235, 253-4 (where the court stated the principle in much broader terms than necessary to condemn the present rate proposal); *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 279 U.S. 768. Cf. *T. & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197.

Before the Transportation Act of 1940 was adopted (September 18, 1940), Division 3 of the Interstate Commerce Commission, without reference to these previous decisions had apparently overruled them in *Ex-River Grain from St. Louis to the South*, 203 I.C.C. 385 (1934).

After extensive debate[2] Congress adopted the Transportation Act of 1940, thereby placing water carriers under the jurisdiction of the Commission, and at the same time (among other things) amending Section 3(1) of the Interstate Commerce Act. This amendment was effected by 5(a) of the Transportation Act of 1940. It added to Section 3(1) a concluding proviso; The amendatory act read:

"Sec. 5. (a) Paragraph (1) of section 3 of the

[2]Summarized in *I. C. C.* v. *Inland Waterways Corp.*, 319 I.C.C. 671, 698 and following.

Interstate Commerce Act, as amended (which prohibits the giving of undue or unreasonable preferences or advantages by carriers subject to part I), is amended to read as follows:

"'(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

(54 Stat. 902; 49 U.S.C.A. 3, Supplement).

The Transportation Act of 1940 by Section 5(e) thereof likewise amended what had been Section 3(3) of the Interstate Commerce Act, adding a new sentence at the end thereof. The amendatory act read:

"(e) Paragraph (3) of such section 3 (which relates to the affording of facilities for interchange of traffic), is amended by striking out '(3)' and substituting in lieu thereof '(4)' and is further amended to read as follows:

"'(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fare, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term

"connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III.' ":

(54 Stat. 902; 49 U.S.C.A. 364, Supplement).

The rates prescribed by the Commission raise the issue of rate discrimination against the connecting barge lines and their traffic. It is essential that its findings should support its result under the statutory criteria governing that situation. The Commission's report discloses, and its brief here confesses, that it approached its problem as though the foregoing amendments to Section 3 had not been made; that it looked at the record before it to see whether particular ex-barge rates eastbound from Chicago would result in a reasonable "through barge-rail" rate when combined with the inbound barge rates (Section 1) and then to see whether the rates so resulting occasioned anything that in its judgment constituted undue prejudice (Section 3(1)). It says on Brief (p. 20):

"The discrimination forbidden by section 3(4) partakes of the same quality as discrimination and *undue prejudice* against persons and localities. Equality of treatment under this section must be determined by similarity of circumstances and conditions. Whether or not there are differentiating circumstances which warrant different rate treatment is the exclusive administrative function of the Commission. This issue the Commission settled affirmatively by specific and categorical findings as to what those differences were as between the *through* all-rail service and the *through* barge-rail service.

And, at Brief 50-51:

"Throughout its report the Commission was careful to stress the fact that it was treating of a *through* barge-rail transportation service and that its one concern was to establish a reasonable and nondiscriminatory charge for *that* service." (Our emphasis.)

In order to bridge the gap between Section 3(1) and Section 2 and Section 3(4), the Commission's Brief depends on *Pennsylvania Co. v. United States*, 236 U.S. 351, 361. (Brief 48, 49.)

The case referred to was one in which this Court, affirming the District Court, refused to enjoin an order of the Commission; the Commission's order was one which compelled the Pennsylvania Railroad to give a connecting railroad switching facilities, that it was giving to other connecting railroads. That decision was correct; obviously it does not support the proposition for which the Commission cites it.

The first paragraph of Section 3 of the earlier Act read, as quoted in that opinion:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Idem.)

In the course of the opinion, this Court, commenting on Section 3 of that Act, said:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is *such undue preference or advantage* is a question not of law but of fact." (Idem.). (Our emphasis.)

When the present case was decided Section 3(1) of the Interstate Commerce Act, as amended, read similarly, except that Congress had added this sentence by the Transportation Act of 1940:

> "Provided, however, that *this paragraph* shall not

be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Our emphasis.) (Section 3(1), 49 U.S.C.A.3(1).)

It is not upon Section 3(1) that we rely. This Court in the cited case paraphrased provisions of the first paragraph of the earlier act in saying that they presented questions of fact and not of law. And Congress later amended that language of that paragraph to say that the provisions of that paragraph did not apply to discrimination against the traffic of any other carrier. This was done as part of the general revision of the Interstate Commerce Act effected by The Transportation Act of 1940. At the same time Congress put Section 3(4) in the form in which we rely upon it; Section 3(4) as amended and not Section 3(1) applies here.

The provisions of other paragraphs of the earlier act (quoted in the opinion) dealing with inter-carrier discrimination as to rates, fares and charges, were not even involved in the cited case. The court said:

> "And, as we have said, the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined." (Idem.)

The Transportation Act of 1940 added the last sentence to Section 3(4):

> "As used in this paragraph the term 'connecting line' means the connecting line of any carrier by water subject to the provisions of this part *or any common carrier by water subject to the provisions of Part III.*"

(Our emphasis.) (49 U.S.C.A. 3 Supplement; 49 Stat. 607c, 722, Title I, Sec. 5(a).)[1]

The Commission sets forth the "circumstances and conditions" (R. 195) upon which it relies as differentiating ex-barge grain from ex-rail and ex-lake grain. On Brief, it described the legal standard it applied and how it applied it. (Brief 20, 48.)

As the application of the decision of this court made in *Chattanooga Packet Co.* v. *I.C.R.R. Co.*, 33 I.C.C. 384, *supra*, discloses, Section 2 cannot properly be applied to the situation presented merely on a consideration of reasonable rates for the through "barge-rail" service. There is no question as to the reasonableness of the inbound rates of the barge lines which are expressly found to be fair and reasonable. There is equally no question of the reasonableness of the established outbound proportional rates of the eastern railroads. Had they not fallen within the zone of reasonable-

[1] This section is in Part I. Appellee is a common carrier subject to Part III. He has been certificated as such by the Commission in collateral proceedings as above pointed out, and as recognized in the report. (262 I.C.C. 7, 23; R. 11.)

A footnote to the Brief for the Commission states that the Commission held that the "port-to-port rates on bulk grain over the Mechling Barge Line were not subject to its jurisdiction. Sec. 303(b) (R. 23.))" This, unless amplified, might suggest that the Commission had held Mechling not to be a common carrier subject to Part III, and disentitled to its protection. The direct contrary is true. (*Ubi supra.*)

Section 3(4), here relied on, is in Part I of the Act. Section 303(b) is in Part III, and does not exempt any "carrier." The "transportation" which it exempts is not "bulk grain." (Cf. Brief for the Commission, p. 33, note.) It exempts "transportation by water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities." (303(b).)

ness, the Commission's duty would have been to require a change and it required none, but left the making of any change to the option of the eastern railroads. The question was discrimination against the connecting barge lines and their traffic, and to treat that question as governed by a statutory test partaking of the "same quality" as undue prejudice against persons and localities was to neglect the 1940 amendment of Section 3(1) which prohibits the application of such criteria to "discrimination, prejudice or disadvantage to the traffic of any other carrier *of whatever description.*" This amendment to the Act at the time when water carriers were first brought within its scope and the emphatic concluding words of the amendment forbade any approximation of Section 3(1) standards as a measure of the meaning of Section 3(4).

The prohibition of Section 3(4) is found in Part I and it is unqualifiedly that carriers subject to Part I which include rail carriers "shall not discriminate in their rates, fares and charges between connecting lines." The amendment included in that protection the lines of water carriers subject to part III. (Section 3(4).)

We contend that the Commission misapplied Section 3(4) by applying its unqualified prohibition of rate discrimination between connecting carriers as "partaking of the nature" of statutory criteria found in Section 3(1) which are addressed to different situations and whose application in any degree to warrant the inter-carrier rate discrimination prescribed by the Commission's order, was contrary to the intent and meaning of the Transportation Act of 1940, especially the proviso added by that amendatory legislation to Section 3(1).

We contend also that the Commission misapplied Section 2, that fixes specific criteria of rate discrimination, by applying the definite criteria of that section as "par-

taking of the nature" of statutory criteria found in Section 3(1), and whose application in any degree to warrant the inter-carrier rate discrimination prescribed by the Commission was contrary to the intent and meaning of the Transportation Act of 1940, especially the proviso added by that amendatory legislation to Section 3(1).

The Commission cannot "average" the standards of the Act, especially not an applicable standard with another whose application to warrant the situation that it prescribes is expressly forbidden.

When it appears as from this report that the administrator adopted the wrong criteria of action, as to which the Commission's Brief pleads it guilty, then it becomes immaterial what findings it may have made. What the administrator would have done in any case if he had adopted other and correct criteria, the court will not undertake to say; that is the administrative function. Accordingly, the findings of the Commission do not support its order for the reason that they were not applied according to the statutory criteria governing the situation presented.

We contend that the findings upon which the Commission relied do not support its conclusion under Section 2 or Section 3(4) of the Act.

It will be apparent that we are not contending that the Commission should establish any particular rates, perpetuate any specific rate scale, or refrain from readjusting the rate situation. We contend that it did not act on the statutory criteria applicable to the situation before it; that the order must fall for want of findings of fact made on substantial evidence that support the result reached

under the applicable criteria;[3] because the commission took into the accounting matters which the Commission could not lawfully permit to influence its judgment upon that situation and under those criteria,[4] and disclose no rational relation between the findings and the result when tested by the applicable criteria.[5] We contend that the findings do not support the order in any of those respects. We contend that the findings do not support the order under either Section 2 or Section 3(4) of the Act.

Moreover, it does not appear from any finding in the report that either the fact or the degree of discrimination described would have been arrived at by the Commission if any of the circumstances and conditions put forward for its justification were left out of the account. This Court will not presume that the discrimination, in fact or amount, would have been arrived at if any of its avowed bases were removed. For this Court to justify the discrimination on less ground than the administrator accepted, would be for this Court to attempt the administrative function.

If the unqualified prohibition of Section 3(4) as amended by the Transportation Act of 1940 against rate "discrimination" between connecting lines is applied according to its terms, as we think it should be then it condemns the order, because the Commission attempted to justify what Congress forbade.

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[3] *Florida* v. *U. S.*, 282 U.S. 194, 215.
U. S. v. *B. & O. R. Co.*, 293 U.S. 454, 464.
U. S. v. *Chicago, M. & St. P. R. Co.*, 294 U.S. 499.

[4] *Mitchell* v. *U. S.*, 313 U.S. 80.
Interstate Commerce Commission v. *Diffenbaugh*, 222 U.S. 242.
Interstate Commerce Commission v. *Stickney*, 215 U.S. 98.
Ann Arbor R. Co. v. *U. S.*, 281 U.S. 658, 666.
Anchor Coal Co. v. *U. S.*, 25 F. (2d) 462, 471.

[5] *Rochester Tel. Co.* v. *U. S.*, 307 U.S. 125, 146.

Certainly the "discrimination" forbidden by Section 3(4) cannot "partake of the nature of the standards of undue prejudice found in Section 3(1), whose application "to discrimination, prejudices or disadvantage to the traffic of any carrier of whatever description" is now forbidden.

Section 2 does more than merely to forbid "unjust" rate discrimination; it says what it means by unjust—a higher rate or charge made, collected or received, from one person than another for "a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions." (Section 2, 49 U.S.C.A. 2, 24 Stat. 379; 41 Stat. 479.)

The Commission categorically set forth the "dissimilarities" upon which this discrimination is sought to be justified, introducing them as follows:

> "Where, as here, ex-rail and ex-lake proportionals or specifics reflect average (*sic*) circumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.
>
> "The principal differences may be summarized as follows:" (R. 32; 195 and following.)
>
> "1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory."

To understand this statement in the summary of the facts to which it has reference in respect of "less terminal service at the gateway or junction, less transit service at intermediate points in official territory," it is neces-

sary to refer to the earlier finding of the facts thus summarized. Terminal and transit services do not refer to cost of elevation. The finding to which this point of the summary is related is found at 266 I.C.C. 7, 22 (R. 25, 26, 197). It reads as follows:

> "The western factors of the through rail rates include not to exceed three transit services without additional charge, and to the extent that the all-rail shipments receive transit on the in-bound movements to the gateways there is less demand on the eastern carriers to perform transit service thereon. This record shows that there is a very substantial *volume* of domestic grain and grain products moving from points west of the gateways to the East without transit *at the gateways or points east thereof.* That such through movements by rail are substantial is shown by the statistics set forth in appendix B hereto coupled with the fact that official territory consumes as grain or products about 156,000,000 more bushels annually that it produces. Moreover, all-rail grain may be, and frequently is, marketed and processed at Chicago under one transit operation, which avoids the necessity for processing at an intermediate point east thereof. Transit is not available under the inbound barge rates. Barge-rail grain is marketed but not processed at Chicago. To be processed before final destination it must be transited at some point beyond Chicago. It follows that respondents are called upon to perform more transit service, on the average, on the ex-barge than on the ex-rail traffic." (262 I.C.C. 7, 22) (Our emphasis.)

Assuming that the evidence referred to in appendix B warrants the conclusion that the amount of grain moving through Chicago by rail without transit or terminal stop there or east thereof is "substantial," the vice of this is at least threefold:

(a). Assume substantial amounts of ex-rail grain move east without transfer or terminal service at or east of Chicago, what of the volume of ex-rail grain that moves

eastbound from Chicago and does receive full transit and terminal service at the hands of the eastern railroads? The latter is transported under similar circumstances and conditions. To reach out for traffic that is allegedly *not* transported under similar circumstances and conditions, and average it with that which *is*, perverts Section 2, and *a fortiori* Section 3(4).

(b). Still assuming substantial amounts of ex-rail grain move east without transfer or terminal service at or east of Chicago, those amounts when *averaged* (as the report says it does) with the whole of the vast volume moving through Chicago may be, for all the report shows or finds, relatively so small that the average difference relied on is miniscule, not substantial.

(c). The consequence is that "indirectly" (Section 2) ex-rail grain which receives full terminal and transfer service at the hands of the eastern railroads receives a lower charge than ex-barge grain receiving the same terminal and transfer service at the hands of the eastern railroads. This is at least equally offensive to Section 3(4).

(d). The reshipping rate in question is not conditioned in any way upon the amount of terminal or transfer service at or east of Chicago rendered by the eastern railroads. (R. 202.)

(e). Ex-lake grain eastbound from Chicago will be accorded the same reshipping rate as ex-rail grain, lower than the prescribed rates on ex-barge grain.

The Commission finds:

> "Unlike the all-rail traffic the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading and requires a full origin and terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation." (262 I.C.C. 7, 18, 19; R. 22, 197, 203-204.)

(f). In other respects the finding fails to comply with legal requirements to support the conclusion under either Section 2 or 3(4) and the District Court correctly held that it did not do so.

The remaining circumstance or condition mentioned in Paragraph 1 of the "principal differences" put forward by the Commission is:

> "On the average, as compared with ex-barge grain, the movement under the ex-rail proportionals and specifics required * * * less line-haul service to the southern portion of central territory."

Obviously, line-haul out of Chicago by eastern railroads of grain received by them at Chicago, cannot be affected by how the grain got to Chicago. The reference in the report is believed to be to the fact that some grain that does not come to Chicago at all reaches central territory at a point further south than Chicago.

Nothing in the report discloses the relevance of the "circumstance and condition" last mentioned to the discrimination prescribed against ex-barge grain in reshipping rates from Chicago to New England and trunk line destinations.

The next circumstance or condition mentioned by the report is:

> "The in-bound rail hauls of all the traffic which engages the ex-rail proportionals are substantially longer on the average (*sic*) than the in-bound barge hauls."

The precise character of the discrimination prescribed is discrimination against all connecting barge lines, in favor of all connecting rail lines, in respect of the rate for the eastbound movement from Chicago that each must have to attract inbound traffic to its lines. For example, appellee competes with the Rock Island Railroad for

inbound traffic to Chicago from Illinois producing origins. It is irrelevant to the interest which these sections of the Act are designed to protect, that the Rock Island may enjoy longer inbound hauls from other origins that are not even water-competitive. It has no relevance that the Frisco, for example, may have longer inbound hauls of grain from non-water-competitive origins in the far southwest. Such facts are not relevant to the non-discriminatory relationship prescribed by the statute in respect of the eastbound rate from Chicago on grain for which appellee competes with the western railroads at water-competitive origins.

A carrier with a long haul is not in a favored position in law with respect to the protection of the Act against discrimination when he enters into competition with a carrier whose haul is short.

In respect of their right to protection against discrimination, under Section 2, or Section 3(4), carriers cannot be grouped with reference to the circumstance that their total hauls are long or short, as to the rates accorded their respective traffic for which they compete at the same producing origins, and with respect to which the length of inbound haul is just the same. Such an interpretation of the statute would leave the short haul carrier at the mercy of the long haul carrier with respect to traffic each originates at the same short haul origin west of Chicago.

And surely carriers cannot be grouped *by types* with reference to the circumstances of the *average* length of inbound hauls.

The report then mentions three "rate-making circumstances" said to be "characteristic of the all-rail traffic, but not of the barge-rail traffic here considered." (R. 82, 196.)

The first of these reads:

> "(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of gateways an average out-bound factor which is a component part of many through rates of different amounts, which vary with the length of the in-bound hauls and the western factors applicable thereto." (R. 32, 196.)

This is not difference but identity. The same, in the same words, is precisely true of both the ex-rail and ex-barge reshipping rates.

The next "rate-making circumstance" reads as follows:

> "(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the in-bound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways."

As to the "Fourth Section Rule", referred to also in brief of counsel for the Commission by that description, it reads as quoted in the margin.[6]

This is not the rule of the statute but the rule of certain rail tariffs. The local rate therein referred to is the local rail rate. This rail tariff provision serves to prevent violations of the 4th Section of the statute with respect to all-rail transportation on all-rail routes. To apply that rule to barge arrived grain would effectively destroy the advantage of low cost water transportation of grain into Chicago.

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[6] "In no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rate from the reshipping point to be added to the reshipping rate therefrom."

The 4th Section rule of the rail tariffs is in the rail tariffs to conform *all-rail* transportation (relative to higher all-rail local rates) to the long-and-short haul principle of Section 4. Congress has expressly provided that the long-and-short haul principle as found in the statute shall not apply to require any change in an established rail rate. (Transportation Act of 1940, Section 6(b)). The Commission has taken a rule from railroad tariffs which effectuates the long-and-short haul principle in all rail transportation *in relation to the higher costs of all rail* transportation. The long-and-short haul principle of the statute was negatived by Congress as a reason for the result here reached.

The essence of the question is: Shall the advantage of low cost in-bound water transportation to Chicago end at Chicago (because of the effect of the long-and-short haul principle—as applied to higher cost all-rail transportation) or shall it be preserved at every destination on the barge-rail route?

There is equity in preserving the low cost of water transportation at every destination on the barge-rail route. When Congress by Section 6(b) made that equity a superior one as a matter of law it is not to respect the will of Congress for the agency of Congress to make it inferior—as a matter of equity. The judgment of Congress on the relative equities involved is apparent and is made a specific mandate of the statute.

Examination of the so-called 4th Section rule above quoted will make it evident that the application of the 4th Section provision of tariffs governing all-rail traffic and derived from the 4th Section would make railway costs, as reflected in higher local railway rates eastbound from Chicago, the measure of the advantage to be preserved from the low cost of water transportation into Chicago.

Congress did not intend the high costs of *rail* transportation, as reflected in *local* rail rates, to be the measure of the inherent low cost advantage of water transportation that it directed the Commission to preserve.

It will be recalled that this is here put forward by the report purely as a rate-making circumstance. As a rate-making circumstance it has no equity. *U. S.* v. *Chicago, M. St. P. & R. R. Co.*, 294 U.S. 499, 505.

The invocation of the 4th Section and its long-and-short haul principle, whether it is an application of the statute itself or of the reflection thereof in railway rate tariffs as a justification of a discrimination against the traffic of a connecting water carrier, is precisely a way of discriminating against the traffic of a water carrier because his costs are low. The question is not whether Congress should have left it to the Commission's discretion to do that, which is the burden of the Commission's brief. The question is rather whether Congress did leave it to the discretion of the Commission to do that. We submit that it did not.

This consideration as originally phrased by the Commission consisted of "breaking down" the railroad rate structure and as rephrased in the present report of "jeopardy" to the railroad rate structure. As heretofore pointed out, even the equities which moved the Commission are not strictly 4th Section equities, but equities as to which "elevator companies at rail origins in Illinois" are in "the same relative position" as farmers in central territory east of Chicago. Whatever the merits of such alleged equities, and whether the Commission may seek them or not, they are an invocation of the Commission's views as to "undue preference and prejudice" (Section 3(1)) which may not be here applied under the proviso added to that section by the Transportation Act of 1940.

The report does not proceed on any finding of a lower charge for a longer haul via barge-rail.

The next "rate making circumstance" put forward by the report to justify this discrimination is that mentioned as Item 2 of paragraph 3 (b), (R. 32, 196) and is that the ex-rail proportionals or specifics to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways. Official territory destinations are those lying east of Chicago.

The Commission also says that:

> "Peoria and St. Louis would, of course, be entitled on reasonable request to ex-barge proportionals properly aligned with those approved herein from Chicago, but the record does not contain sufficient detail for the prescription of such proportionals in this proceeding."
>
> 262 I. C. C. 732, (R. 36, 210).

It is evident that if the low cost advantage of water transportation on the in-bound route to Chicago is to be reflected east of Chicago in any degree, then there will be produced a situation whereby the lower rated barge-rail route moves traffic at rates less than all-rail rates. The only way to eliminate the "disharmony" is to eliminate the benefits of the low-cost water transportation; to the degree that the low-cost water transportation is destroyed, harmony is restored. That was the essence of the original proposal of the eastern railroads. It will be borne in mind that this is put forward strictly as a rate making circumstance. If any other considerations whatever were involved they are not found. *U. S. v. Chicago, M. & St. P. & P. R. Co.*, 294 U. S. 499, 505. Local rail rates east of Chicago necessarily reflect the higher costs of rail transportation. It will be borne in mind that the ex-rail grain rates east from Chicago are

exactly the same and have been the same for years and were made the same by the eastern railroads to all New England and trunk-line destinations as the rates on ex-barge grain, and that the eastern carriers received exactly the same compensation for the transportation of ex-barge grain that they receive for the transportation of ex-rail or ex-lake grain.[7]

Presumably the Commission would hesitate to harmonize the rate situation by increasing the in-bound water rates, which it finds fair and reasonable, to the level of the in-bound rail rates. (Cf. Alldredge & Lee, dissenting from the report. R. 38). Referring now (in the terminology of the Commission's Brief) to the "water-rail route," the Commission originally effected harmony by permitting the eastern carriers to increase their outbound rail rates on the ex-barge grain to the same level that would have been required under the "4th Section Rule" of the railroad rail tariffs if the in-bound water route had been a rail route. It now permits the outbound rail rate on the ex-barge grain to be somewhat increased—failing to achieve the "harmony" originally aimed at by the eastern railroads—a harmony which can be accomplished only by completely stopping the advantage of the low water cost into Chicago at Chicago—and permitting part, but only part, of that low-cost advantage to be preserved east of Chicago. The high cost of rail transportation, as reflected in local rail rates east of Chicago, is not the measure of the low cost advantage of water transportation that Congress directed the Commission to preserve. The finding does not rationally support the result. Disharmony, with rail rates reflecting higher rail costs (and especially local rates), is bound to be produced by incorporating the low cost of water

[7] (R. 181).

transportation in the national transportation system. If, as and when this should produce consequences which under the standards of the Act the Commission is authorized to minimize or avert, even at the sacrifice of the low cost advantage of water transportation, then a different case would be presented than the one stated in the Commission's report. The thing it has said is that because railroad costs are high, as reflected by local rail costs east of Chicago, therefore the low cost advantage of water transportation must not be fully reflected east of Chicago.

As pointed out by Commissioners Alldredge and Lee dissenting from the report, there is no logical relation of cause and effect in the Commission's order; that its essence is to get more traffic for the western railroads, although that traffic is now attracted to water transportation by water rates which are expressly found to be fair and reasonable. (R. 39, 40).

As to the equalization of routes and gateways, there is no suggestion whatever in the Commission's report of any consideration that would prevent the equalization of barge-rail rates via Chicago with barge-rail rates via other routes and gateways. The equalization of the Chicago gateway with a gateway that lies off the water-rail route merely in order to make the all-rail rates via such other route equal with water-rail rates via Chicago would merely be to sacrifice the low cost advantage of the water transportation on the water-rail route, here put forward as a justification for discrimination against the traffic of in-bound water carriers and purely as a "rate making circumstance"—no other objective being disclosed by the findings. If the fact that rates are lower on barge-rail routes than they are on all-rail routes constitutes a rate making circumstance

supporting the equalization of water-rail routes and gateways with all-rail routes and gateways, what becomes of the inherent advantage of low cost water transportation?

The Commission then points out in paragraph numbered four that lake grain from the northwest consists chiefly of wheat, which has a relatively long water haul in-bound and is usually preceded by an in-bound rail haul, the rail-lake-rail combinations, in general, conforming to the principles which underlie Section 4. (R. 32, 196) Here, again, the Commission is confronted with an Act of Congress which forbids the application effected by the Transportation Act of 1940 of the long-and-short haul principle of Section 4 to water rates, to have the consequence of requiring a change in established rail rates. The Commission does not find that there is at any point a greater charge for a shorter haul on the barge-rail route, nor is there. If the low cost advantage of water transportation is to be preserved then a lower cost via barge-rail than via all-rail is inevitable. Section 4(1)a concededly does not require the result reached (R. 35). As to the "principles" of Section 4 the Commission cannot rightfully apply those principles where Congress has said the section shall not apply; to do so is to depart from the criteria of the Act. It is again to sacrifice the low cost advantage of water transportation, reflected by fair and reasonable water rates into Chicago, when combined with rates of the eastern railroads yielding them exactly the same return that they receive when they transport ex-rail grain originating west of Chicago at the same producing point.

We emphasize that if the proportional rail rates east from Chicago were made to vary according to the length of the in-bound haul from the same origin point west of Chicago, and regardless of whether the transportation

into Chicago was by water or by rail, the situation would then be very different from that which the Commission has created by its order. If the ex-rail and ex-barge rates eastbound from Chicago are the same on grain produced at Morris, Illinois, there is no discrimination against the traffic of the connecting rail and water carriers who bring to Chicago from Morris. If that proportional rate eastbound from Chicago on grain originated at Morris were different than another proportional rate eastbound from Chicago and applying on grain that originates in New Madrid, Missouri, that fact would not constitute a discrimination against the lines of the connecting rail and water carriers who compete for the grain traffic into Chicago from New Madrid—provided the rail rate from Chicago on grain originating at New Madrid were the same regardless of whether it had come to Chicago from Madrid by the line of a barge carrier or by the line of the western railroads. The position here taken is not in the slightest degree inconsistent with proportional rates out of Chicago which vary with the length of the in-bound haul to Chicago. The objective achieved by the Commission's order, however, is to make the proportional or reshipping rate eastbound from Chicago higher on grain that comes in from Morris, Illinois, by barge line than on identical grain coming in from Morris, Illinois, by railroad.

The relevance of any consideration as to whether the grain is wheat or corn to the considerations that produced the order is illustrated by the fact that the higher outbound rate is charged on wheat coming by barge to Chicago from such distant points as Kansas City (on the line of the Inland Waterway Corporation) or St. Louis (on the line of this carrier) and the lower outbound rate is to be charged on wheat from the northwest reaching Chicago by water.

The lower court concluded:

> "The findings of the Commission do not disclose any rational relation between such differences, if any, and the difference in reshipping rate prescribed on ex-barge grain as compared with the established reshipping charges that remain applicable on ex-rail and ex-lake grain and that have hitherto been applicable on ex-barge grain."

We submit the finding was correct.

We submit that the order prescribes rates which are not supported by the findings of the Commission under Section 2 of the Interstate Commerce Act or under Section 3 (4) of the Interstate Commerce Act.

III.

The National Transportation Policy.

The legislative history of the Transportation Act of 1940,[7] and the specific terms of the Act,[8] leave no room to doubt that low cost is the inherent advantage of water transportation, nor any question whatever that the framers of the Act, throughout its provisions, sought to give the Commission a mandate to preserve it.

The Commission on Brief asserts in substance that the extent to which the conceded low-cost advantage of water transportation must be preserved, is a matter of its own exclusive and unreviewable discretion.[9]

That contention raises an issue also under the statutory provisions above referred to giving the courts the duty to review the acts of the Interstate Commerce Commission.

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[7] 319 U. S. on 698.

[8] 319 U. S. on 680, n. 4.

[9] Brief, 31.

When the Commission, in determining the extent to which the low-cost advantage of water transportation shall be destroyed or preserved, by confession,[10] undertakes to assimilate the measure of its delegated discretion under Sections 2 and 3(4), to the broad standards of Section 3(1)—that the Transportation Act of 1940 forbade it to resort to on such an issue—is it the intent of the Urgent Deficiencies Act that this, also, shall be in the exclusive discretion of the Commission? When the Commission resorts to considerations of "undue prejudice between persons and places"[11] as the measure of its delegated authority on the issue of inter-carrier rate discrimination under Sections 2 or 3(4)—as, by curtailing the inherent low cost advantage of water transportation in the interest of elevators at "rail origins in Illinois"—is it the intent of the Urgent Deficiencies Act that that, also, shall be in the Commission's discretion? Is the avowed assimilation of precise and prescribed standards (Sections 2 and 3(4)) to broad and forbidden statutory standards (Section 3(1)) in curtailing the inherent low cost advantage of water transportation, a matter for the uncontrolled discretion of the Commission? When Congress by express enactment in the Transportation Act of 1940 said that the new application of the long-and-short haul principle to water rates (Section 4(1)a) should not require that established rail rates be changed, was it in the discretion of the Commission to say that this meant only that the Commission should not for that reason require them to be changed, but that it was free just as effectively to curtail the low cost advantage of water transportation by permitting them to be changed, in amounts that it prescribed, because the application of the long-and-short

[10] Brief, 20, 48.

[11] Brief, 20, 48.

haul clause to water rates effected by Section 4(1)a required that? Does that not overlook that *it was not that the Commission* was by Section 6(b) forbidden to "require" the increase of established rail rates; rather, it was that *the new application of the long-and-short haul clause to water rates effected by Section 4(1)a* should not require that result—and is not that the result that the Commission has in substance brought about, and precisely because of the application effected by Section 4(1)a of the long-and-short haul clause to water rates, contrary to Section 6(b)? It seems to us that all these questions must be answered unfavorably to the claim of exclusive discretion now asserted and that this Court is called upon to correct errors of law and reject the Commission's order as unsupported by the findings under the applicable statutory criteria.

It would be extraordinary if the National Transportation Policy manifested by the Act and its several specific amendments [12] should be made the means of equalizing the natural economic advantages and opportunities, precisely those that arise from accessibility to low cost water transportation, when that could not be done under any section of the Act prior to enactment of the 1940 amendment, and the amendatory legislation was at such pains to ensure that exactly that natural advantage should be preserved.

We had looked for counsel's discussion on brief of the following statement in the report, which itself is the only discussion of the relation of the result reached to the National Transportation Policy we can find there:

> "The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same outbound proportionals if, as the Act requires, the in-

[12] Cf. 319 U. S. on 678, note 4.

herent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower inbound cost but, in addition would extend to the barge-rail transportation very nearly all the advantages of all rail transportation."
(R. 35.)

CONCLUSION.

We submit that the order of the specially constituted District Court should be sustained.

Respectfully submitted,

EDWARD B. HAYES,
for A. L. Mechling, doing business as A. L. Mechling Barge Line, Appellee.

EDWARD B. HAYES,
Of Counsel.

APPENDIX A.

National Transportation Policy
(Title 49 U.S.C.)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Transportation Act of 1940
(Title 49, U.S.C., sec. 4, note)

Sec. 6(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of

this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application.

INTERSTATE COMMERCE ACT

(Title 49, U.S.C.)

Sec. 3(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

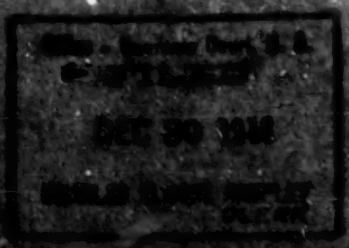
Sec. 4(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included

within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Sec. 15a(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 72

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

A. L. MECHLING ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLANT

OPINIONS BELOW

The report and order of the Interstate Commerce Commission the validity of which is here involved (R. 10) is reported in 262 I. C. C. 7.[1] The findings of fact and conclusions of law of the District Court (no opinion was filed) are not reported.

[1] The prior reports of the Commission in the same proceeding were before this Court in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671. They are reported in 246 I. C. C. 353 and 248 I. C. C. 307.

JURISDICTION

The decree of the District Court was entered on November 26, 1945 (R. 207). The petition for appeal was filed and allowed on January 24, 1946 (R. 209). Subsequently, on February 21, 1946, the order allowing the appeal and citation on appeal were amended so as to include the United States as a party appellee (R. 221).[2] Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219–221 (U. S. C., Title 28, Secs. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted April 29, 1946 (R. 228).

STATUTES

The pertinent portions of the Interstate Commerce Act are reproduced in the Appendix hereto.

[2] The original petition for appeal and all the other appeal papers named as appellees the plaintiffs in the three actions in the court below. Although the United States was the statutory defendant in each of them, it obtained a rule to show cause why it should not be served with the appeal papers as a necessary party appellee (R. 220). Following return of this rule the court entered its order requiring true copies of the order allowing appeal, citation on appeal directed to the United States, and all other appeal papers, be served on the United States within five days and amended the order allowing appeal and citation on appeal accordingly (R. 221).

STATEMENT

The proceeding out of which the present appeal arises has been in controversy since October 1939. The initial phase of it was before this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671. A proper perspective of the present issues requires a short statement of this background.

A. The Prior Proceedings

By tariffs filed to become effective October 15, 1939, certain eastern line railroads proposed to restrict the application of their proportional rates on grain and grain products, in carloads, from Chicago, Ill., and other related rate-break points, to eastern destinations so that they would not engage traffic arriving by barge over the Illinois Waterways at the rate-break points. Thus ex-barge grain traffic moving by rail to eastern destinations would be subjected to the existing local rail rates. These tariffs were suspended by the Commission pursuant to section 15 (7) of the Interstate Commerce Act[3] and the proceeding here involved was commenced under the designation *Investigation & Suspension Docket No. 4718, Grain Proportionals, Ex-Barge to Official Territory.*

In due course there issued two reports, one by Division 2 (246 I. C. C. 353) and the second on

[3] See Appendix, *infra*, p. 88.

reconsideration by the entire Commission (248 I. C. C. 307). By these reports the Commission sustained the validity of the proposed tariffs. Thereupon three suits were filed (subsequently consolidated) to set aside the Commission's order. They culminated in this Court's decision upholding the order. In its decision this Court pointed out that the protestants' case both before the Commission and in the court was pitched upon the proposition that the exbarge grain traffic could not lawfully be denied the use of the rail proportional rates outbound, and the decision of the Commission did no more than to hold to the contrary upon the record before it, at the same time recognizing that in a proper proceeding it might "prescribe proportional rates on the exbarge traffic lower than the local rates or joint barge-rail rates lower than the combinations." The ultimate decision of this Court was:

> Read in the context, we think it [the Commission's finding that the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act] meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules "are not shown to be otherwise unlawful" is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval

or a prescription of the rates under suspension. Since the Commission refused to approve or prescribe them, they stand only as carrier made rates which, under the Commission's decisions leaves them open to possible recovery of reparations. Like the Commission, we also refrain from approving or prescribing them.

B. The Present Proceedings

Following this decision the Commission on July 13, 1943, reopened the original case, I. & S. 4718, for further hearing to determine whether or not proportional rates should be prescribed on this ex-barge grain traffic, and if so, to determine the measure of such proportional rates, or to determine what, if any, reasonable and otherwise lawful joint barge-rail rates should be prescribed for the transportation of grain between barge origins and the eastern rail destinations (R. 56).

Further hearing was then had at which appeared, among others, the appellees in this appeal and the interested rail carriers. A voluminous record was made following which briefs were filed. A proposed report by the trial examiner was issued. Exceptions thereto were filed and the case was orally argued before the entire Commission.

On February 13, 1945, the Commission issued its report and order which is the subject of this suit (R. 10).

The Commission, by this report and order, condemned and ordered cancelled, the proposed tariffs which would have subjected the ex-barge traffic to the use of the local rail rates. The report itself, however, considered in detail the existing rate situation and its development, the nature and volume of traffic involved and the transportation characteristics of the barge-rail movement in question as compared with the all-rail movement. It concluded that ex-barge proportionals may vary from the ex-rail and ex-lake proportionals. It thereupon approved a scale of ex-barge proportionals made differentially under the local rail rates and which resulted in all instances in through barge-rail combination rates considerably lower than the through all-rail combination rates.

The ultimate findings of the Commission are (R. 36):

> 1. We find that we should not prescribe joint rates on the barge-rail traffic above described.
>
> 2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein, under sections 1, 2, 3 (1), 3 (4), 6 (11) (b), and 15a (2) of the Interstate Commerce Act, administered with a view to carrying out the national transportation policy, will be those made differentially under the local rail rates which are or may

be hereafter concurrently maintained from Chicago, as set forth below, with the customary differentials on the products and export traffic which are no less favorable to the ex-barge traffic and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other.

When the local rail rate on grain is: Cents	*Differential ex-barge under local rate, shall be:* Cents
13–14	1
15–22	2
23–24	3
25–26	4
27–28	5
28.5 and over	5.5

3. We further find that such ex-barge proportionals shall be subject to the same policing provisions as the ex-rail and ex-lake proportionals, but shall not be made subject to the fourth-section rule.

As the proposed schedules have not become effective due to the voluntary postponement by respondents of the effective date thereof, no order requiring establishment of the rates herein found lawful appears necessary at this time. An order will be entered requiring the cancellation of the proposed schedules, without prejudice to the filing of new schedules in conformity with the findings herein.

The order of the Commission of February 13, 1946, which accompanied this report merely re-

quired the cancellation of the tariffs which would have subjected the ex-grain traffic to the local rates, on or before April 5, 1946, upon not less than one day's notice (R. 49). This date was subsequently extended to June 5, 1946.[4]

C. The Proceedings in the Court Below

Following service of the report and order of the Commission three separate proceedings were instituted in the court below to set aside that portion of the Commission's order which approved a scale of proportional rates on the ex-barge traffic differentially higher than the ex-rail and ex-lake proportionals. The complaint of Mechling Barge Line and of the Secretary of Agriculture named only the United States as defendant (R. 1, 67). The complaint of the Inland Waterways Corporation joined as defendants both the United States and the Interstate Commerce Com-

[4] Commissioner Miller dissented on the ground that the Commission should not have prescribed proportional rates on the ex-barge traffic since such traffic is not subject to the Commission's jurisdiction under the exemption of section 303 (b) (R. 37).

Commissioner Alldredge dissented on the ground that if the Western railroads were suffering from the barge competition the remedy was not to increase the revenues of the eastern carriers, and further, that the action of the majority was in violation of section 3 (4) (R. 38).

Commissioner Patterson dissented on the ground that prescribed rates perpetuate fourth-section departures and prevent the rail carriers, against their will, from eliminating them in contravention of the law (R. 40).

mission (R. 57). None of these complaints named respondent rail carriers as defendants nor did such carriers see fit to intervene in these suits.

The United States through the antitrust division of the Department of Justice filed its several answers to the complaints confessing error as alleged and joining in the prayers for relief (R. 81, 82, 83). The Interstate Commerce Commission intervened and answered to the merits denying the allegations of error and thus issue was joined (R. 75, 77, 78). These three complaints were subsequently consolidated.

In the meantime the respondent rail carriers on June 2, 1946, in compliance with the Commission's order, filed tariffs cancelling the tariffs under consideration in I. & S. 4718, and at the same time proposed to make effective on October 5, 1945, proportional rates on ex-barge grain conforming to those approved by the Commission (R. 114).

On or about October 1, 1945, the Secretary of Agriculture, one of the plaintiffs in the consolidated cause, filed his motion for an order temporarily restraining the operation and effect of the Commission's order to the extent that it approved or authorized the ex-barge proportionals above mentioned, and temporarily restraining the Commission from permitting such rates to become effective (R. 114). Hearing was had on this motion on October 4, 1946, and on the same

day the court below issued an order directed solely against the Interstate Commerce Commission temporarily restraining it from permitting to become effective any tariffs that had been or might be published in conformity with its order approving a scale of ex-barge proportional rates (R. 152).

Under compulsion of this temporary restraining order the Commission on October 4, 1945, issued an order suspending the tariffs which were to have become effective October 5, 1945, until May 5, 1946.[5]

Final hearing upon the merits of the consolidated actions was had on October 16, 1945, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220) (R. 156). After the entire record of the proceedings before the Commission was offered and received in evidence and without hearing the plaintiffs in the cause, the court below announced that it desired to hear from the Commission in support of the order in issue. Whereupon the Commission

[5] The Commission has no power to suspend proposed rates except in accordance with the provisions of section 15 (7), see Appendix, p. 88, *infra*. Its power to suspend proposed rates must be coupled with a hearing and investigation concerning their lawfulness, and is limited to a period of seven months regardless of whether such investigation has been completed. The power of the court below to compel the Commission to suspend the rates in issue is challenged in this appeal.

argued the validity of the order based upon the findings contained in the Commission's report and the assertion of statutory authority based thereon. At the conclusion of the Commission's presentation the court below orally announced its judgment for the plaintiffs and against the validity of the Commission's order (R. 173).

The court below did not file a written opinion in support of its judgment but on November 26, 1945, adopted over the objections of the Commission, extensive findings of fact and conclusions of law prepared and submitted by the plaintiffs (R. 177).

On January 23, 1946, the Commission within the time allowed by the statute,* filed its petition for appeal to this Court and on the same day the appeal was allowed by the court below (R. 209, 214). The necessary appeal papers were served upon the plaintiffs as appellees as required by the Rules of Court. On February 12, 1946, the United States acting through the antitrust division of the Department of Justice obtained in the court below a rule against the Commission to show cause why the United States should not be designated as a necessary party to the appeal and served with appeal papers therein (R. 220). On February 21, 1946, following hearing on the rule the court below entered an order directing the Commission to serve upon the United States

* C. 32, 38 Stat. 220; Judicial Code, sec. 20.

true copies of the order allowing the appeal, citation on appeal and all other papers required by law and amended the order allowing the appeal and the citation on appeal accordingly (R. 221).[1]

ASSIGNED ERRORS TO BE URGED

1. The court below exceeded its authority in making independent findings of subordinate facts and weighing the evidence and reaching conclusions upon administrative matters (Assignment of Errors Nos. 3 to 6, inclusive (R. 210)).

2. The court below erred in ignoring the basis for the order complained of as disclosed by the Commission's report, and in passing upon and appraising the probative value of the evidence before the Commission thus substituting its judgment for that of the Commission (Assignment of Errors Nos. 7 to 27, inclusive (R. 211)).

3. The court below erred in holding that the Commission's report lacks findings to support the approved scale of proportional ex-barge proportional rates (Assignment of Errors No. 28 (R. 213)).

4. The court below erred in holding that in some respects the findings of the Commission are

[1] This action has been assigned as error on ground that the United States as statutory defendant cannot be converted by the authority of any statute into an appellee. See *infra*, p. 13.

not supported by substantial evidence (Assignment of Errors No. 29 (R. 213)).

5. The court below erred in holding that the Commission's report disclosed no rational basis for its approval of the scale of ex-barge proportional rates (Assignment of Errors Nos. 30 and 31 (R. 213)).

6. The court erred in holding that the Commission failed to observe the requirements of section 3 (4) and the transportation policy of the Interstate Commerce Act (Assignment of Errors Nos. 32 and 33 (R. 213)).

7. The court below exceeded its authority in its order of October 4, 1945, granting a preliminary injunction, in that it compelled the Commission to exercise its power to suspend the rates in issue in a manner contrary to the provisions of the Act conferring such power (Assignment of Errors No. 35, R. 214).

8. The court below erred in considering and passing upon the motion of the United States for a rule to show cause why it should not be made party to the appeal and served with the appeal papers, and in entering its order of February 21, 1946, upon said motion (Supplemental Assignment of Errors Nos. 1 and 2, R. 223).

QUESTIONS PRESENTED

The order of the Commission involved in this case approves a scale of proportional railroad

rates applicable to grain arriving at Chicago via barge line and subsequently shipped to destinations in the East. The validity of the Commission action must be tested by the conventional standards of judicial review of administrative action. The primary issues are:

1. Do the proportional rates approved by the Commission offend against section 3 (4) of the Interstate Commerce Act and the national transportation policy declared therein?

2. In concluding that the transportation characteristics of the barge-rail service in question differed from the corresponding all-rail service so as to justify a different rate treatment, did the Commission apply lawful standards of comparison?

3. Do the subordinate findings of the Commission rationally support its conclusion that the existing ex-rail proportionals did not provide a proper measure for determining the level of ex-barge proportionals?

4. Do the subordinate findings of the Commission rationally support the scale of ex-barge proportionals approved?

Subordinate issues are:

1. The jurisdiction of the court below to issue its preliminary injunction requiring the Commission to exercise its suspension powers under section 15 (7).

2. The validity of the review accorded the Commission report by the court below.

3. The jurisdiction of the lower court to convert the United States, the statutory defendant, into a plaintiff-appellee.

SUMMARY OF ARGUMENT

I

Neither sections 2, 3 (4) of the Interstate Commerce Act, nor the national transportation policy precludes the Commission from approving proportional rail rates for the transportation of ex-barge grain from Chicago to eastern destinations higher than the contemporaneous ex-rail or ex-lake proportional rates. This was definitely and finally decided by this Court in the prior appeal in this proceeding. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671. The express provisions of the Interstate Commerce Act support this Court's decision. Section 1 (4) authorizes the Commission to establish rail proportional rates to or from the ports differing from the corresponding local rates for the same rail transportation and which apply only to traffic which is brought to or carried from the port by a common carrier by water. Section 305 (c) provides that differences in rates of a water carrier from those in effect by a rail carrier with respect to rail transportation shall not be

deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice. Section 307 (d) directs the Commission in fixing joint water-rail rates to prescribe such reasonable differentials as it may find justified between all-rail rates and the joint rates in connection with the common carrier by water.

The national transportation policy does not require a preference for water transportation. It enjoins the Commission to see to a fair and impartial regulation of all modes of transportation and to recognize and preserve the inherent advantages of each.

The carrying out of the national transportation policy requires administration. The nature and extent of the inherent advantages of each mode of transportation, the manner in which they are to be preserved, especially where they are in conflict, are determinations for the expert judgment of the Commission. That this is so is especially illustrated in the instant case: Where the through transportation cannot be accomplished by water transportation alone it becomes necessary to evaluate the contribution made by each respective mode employed.

The interest of the farmer-shipper of grain lies in the price which he receives for his grain. Low cost water transportation is only one factor in determining that price. The cost of trucking

grain to the river and other necessary costs incident to river transportation are necessarily involved in measuring the inherent advantage of this barge transportation. It cannot be assumed that these costs will remain constant and that variation in the cost of the rail segment of the through transportation is to be looked to alone.

The barge-lines interest lies in obtaining as much traffic as possible. But they have no inherent right to claim as tributary to their river routes territory from which by virtue of their own rates and the present cost of trucking to the river they now draw traffic. If the Commission's order in this case operates to reduce that territory—a result which an increase in trucking costs or in the barge rates themselves would effect—that cannot *per se* condemn the order.

It therefore is clear that in determining proper charges for the through barge-rail transportation the Commission was called upon to balance the varying and sometimes conflicting interests represented in the proceeding and arrive at rates for the ex-barge traffic adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto."

The practicalities of the situation, likewise, deny the soundness of the lower court's position the consequence of which is to say that this ex-barge traffic must be accorded the lowest out-bound rail rate. But under the present rate structure there

are varying sets of proportionals applicable to destinations in central territory dependent upon the origin of the grain west of Chicago. Likewise transit balances on one-factor rates through Chicago are available to rail grain. To give full effect to the judgment of the lower court would wholly disrupt the rail rate structure.

By mere accident of tariff publication ex-barge grain has been and is being accorded ex-rail proportional rates which had been developed over a period of years to meet circumstances and considerations which were not present in barge-rail transportation in question. These rates were part of a complicated grain rate structure, the components of which were interrelated so as to reflect average rail transportation conditions governing the entire movement of grain from the producer through primary and secondary markets and processing points to the ultimate consumer. The rates from western origins to the gateways had been prescribed by the Commission. *Grain and Grain Products,* 205 I. C. C. 301.

Equalization as between origin and destination territories and as between the gateways had its place in the fixing of the out-bound rail proportionals from the gateways.

The Official Territory rate structure grew out of an effort to stabilize and reconcile the proportional rates out-bound from Chicago with the existing transit balances of one factor through

rates between origins and destinations within Official Territory. The result was to establish proportional rates equal to the out-bound specific of the one factor through rates whether or not the route was via Chicago. Since the in-bound rail hauls were comparatively short arbitraries were allowed to the western carriers in order for them to secure compensatory revenue which in turn was offset in the out-bound rate. Consequently these specifics as representing divisions of a joint through rate less than would have resulted if they had been constructed on a mileage basis, did not present an appropriate measure for determining the proper ex-barge proportionals.

Because the contention was made that the ex-barge traffic was entitled to proportional rates no higher than the ex-rail and ex-lake traffic bore it became necessary for the Commission to consider the history, purpose, and scheme of these ex-rail and ex-lake proportionals and their relation to the grain rate structure. This the Commission did. Its report pointed out that the underlying factors that gave rise to the particular proportional rates in relation to rate adjustment as a whole provided no pertinent standard for determining the measure of ex-barge proportionals.

Furthermore, as the Commission pointed out, the all-rail rate structure reflects a consistent grading from east to west in strict conformity with section 4 of the Interstate Commerce Act,

whereas to continue the application of the ex-rail proportionals to the ex-barge traffic would result in extreme fourth-section departures and thus perpetuate what this Court termed "the fortuitous and in many respects unlawful benefits of the existing rate structure" (319 U. S. 671, 691).

In meeting the contention that a denial of the ex-rail proportionals to the ex-barge traffic would work a violation of section 3 (4) as a forbidden discrimination against connecting carriers, the Commission found that the differentiating characteristics as between the through barge-rail transportation service and the through all-rail transportation service justified different rate treatment. In so doing the Commission did not transcend its statutory authority or act arbitrarily.

The discrimination forbidden by section 3 (4) partakes of the same quality as discrimination and undue prejudice against persons and localities. Equality of treatment under this section must be determined by similarity of circumstances and conditions. Whether or not there are differentiating circumstances which warrant different rate treatment is the exclusive administrative function of the Commission. This issue the Commission settled affirmatively by specific and categorical findings as to what those differences were as between the through all-rail service and the through barge-rail service.

The court below, however, by its own elaborate and independent findings of subordinate facts reappraised the record upon which the Commission had acted, and concluded that the Commission considered matters that had "no rational relation to the conclusion that such ex-barge reshipping rates could lawfully be those, higher than such ex-rail and ex-lake reshipping rates, prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940." But in so finding the lower court erroneously assumed that the issue involved the determination of the lawful rates for the unrelated ex-barge traffic from Chicago to eastern destinations. It ignored considerations that motivated the Commission in according ex-barge traffic a rate treatment differing from the ex-rail traffic.

But aside from these matters it is difficult to discern a discrimination against the barge-rail movement in the proportional rates approved by the Commission, for in every instance the combined barge-rail rate from any barge origin to any eastern rail origin is less than the all-rail combinations from the same origin to the same destination.

II

Reference to the report of the Commission demonstrates that the basic findings of the Com-

mission provide a rational basis for the scale of ex-barge grain proportionals which it approves.

III

The findings of fact and conclusions of law adopted by the court below and upon which its final judgment rests present a method of judicial review of administrative action at odds with well-established principles. In concluding that the order of the Commission is invalid that court resorted to an examination of the record. It made its own independent findings of subordinate facts, evaluating the weight and pertinency of the evidence before the Commission. It ignored or discarded or weighed the probative value of many of the findings of the Commission. Thus the court below assumed and exercised the right to review the record upon which the Commission acted and to substitute its judgment for that of the Commission upon purely administrative matters.

IV

By its preliminary injunction in this case the court below exceeded its authority in requiring the Commission to suspend the tariffs promulgating the approved scale of ex-barge proportional rates. The Commission power to suspend proposed rates derives from section 15 (7) of the Interstate Commerce Act. But this power can only be exercised as an incident to a Commission

investigation concerning the lawfulness of such rates. Here the predicate for the exercise of the given power was absent.

While the relief sought through the motion for preliminary injunction was appropriate the plaintiffs, through their failure to make the railroads proposing the rates parties to the proceeding and thus subject to process, had themselves foreclosed the court from according them injunctive relief. For the court below to attempt to cure this omission by directing the Commission to exercise a power not given it by statute and in contravention thereof was clearly error.

V

In its order directing that the United States, the statutory defendant, be made a party plaintiff-appellee and served as such in this appeal the court below injected a new procedural requirement in perfecting appeals to this court from the judgment and decree of the specially constituted three-judge district court.

Under the Urgent Deficiencies Act the United States is the only necessary party defendant and may be solely answerable for the defense of the Commission's order. There is no statutory authority for the United States in its sovereign capacity to sue to set aside an order of its own governmental agency. To give it the rights of an appellee where an order of the Commission has

been set aside creates an anomaly, is inconsistent with the statute and imposes an additional burden upon parties seeking appellate review of such order.

ARGUMENT

I. In Approving the Scale of Proportional Rates for the Ex-Barge Traffic in Question the Commission Acted Within the Permissible Range of Administrative Discretion and Under Statutory Criteria

A. The Interstate Commerce Act Does Not Require That Proportional Rates for the Transportation of Ex-Barge Grain From Chicago to the Specified Eastern Destinations Be No Higher Than the Rates That May Be Contemporaneously Exacted for the Same Rail Service on Ex-Rail and Ex-Lake Grain

(1) The Prior Decision in This Proceeding Has Set This Proposition to Rest

Were it not for the course which this case has taken since the prior decision of this Court, *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, we would consider it unnecessary to reargue the premise that under sections 2 and 3 (4) and the national transportation policy the Commission is not precluded from approving proportional rates for the transportation of ex-barge grain higher than the contemporaneous ex-rail or ex-lake proportional rates. We thought, and still think, this Court's decision was clear on that point. But in the subsequent proceeding before the Commission the present appellees, while not explicitly so contending, in effect urged a repudiation of this Court's decision by contending that under the record the approved

ex-barge proportional rates should be no higher than the ex-rail or ex-lake proportionals even though it would preserve what this Court termed "the fortuitous and in many respects unlawful benefits of the existing rate structure" (p. 691).

The prior proceeding was contested upon appellees' contention that the Interstate Commerce Act itself, particularly the national transportation policy declared therein and sections 2 and 3 (4), condemned the establishing of proportional rates applicable on ex-barge traffic higher than prevailing proportional rates on the ex-rail or ex-lake traffic. On this score the Commission said in its report, *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 311:

> Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial against Chicago, the ex-barge traffic, shippers, elevator operators, and dealers interested in the ex-barge traffic, and the Federal Barge Lines as a connecting line, and unduly preferential in favor of other lake ports, ex-rail and ex-lake traffic and in favor of shippers, elevator operators, and dealers interested in ex-rail and ex-lake traffic and respondents' connections by rail and lake. This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the

> reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to the relative length and nature of the in-bound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates, or joint barge-rail rates lower than the combinations.

This statement was quoted and approved by this Court in its subsequent decision (pp. 681, 684). This Court then noted that the case had developed on the theory that ex-barge grain was entitled to the unrestricted use of ex-rail proportionals and the record before the Commission did not contain material from which the Commission could properly rate the barge-rail traffic. After enumerating "the fortuitous and in many

respects unlawful benefits of the existing rate structure" (p. 691), this Court said (p. 688):

> * * * Nothing in the Interstate Commerce Act as amended by the Transportation Act of 1940, or in the statements of even the most ardent champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

As to the National Transportation Policy as affecting the issues the opinion stated (p. 691):

> The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport. It also seeks "sound economic conditions" for all kinds of transportation.

While this decision left open to the Commission to decide upon a proper record what rail rates this ex-barge traffic might lawfully engage, it did not restrict the Commission in the performance of that administrative function and clearly removed from the case any basis for the view that the similarity of the circumstances and conditions obtaining in the out-bound rail movement of all grain from Chicago precluded the Commission from considering differences found to exist

between the through barge-rail movement and the all-rail movement as a matter of statutory requirement.

(2) The Provisions of the Act Itself Confirm This Court's Prior Decision

The Panama Canal Act, 37 Stat. 568, in 1912, conferred jurisdiction on the Commission to determine the terms and conditions upon which physical connections are to be operated between common carriers by water and common carriers by rail, the power to establish joint routes and maximum joint rates over rail and water lines (now incorporated into section 1 (4)), and the power to establish proportional rates, or maximum or minimum or maximum and minimum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier (now section 6 (11)). Proportional rates were then defined:

> By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

The Inland Waterways Corporation Act, 43 Stat. 360, in 1924, provided for the certificating of common carriers by water who desired to join with railroads in through routes and joint rates and empowered the Commission to compel all

connecting common carriers to join with such water carriers in through routes and joint rates and in so doing to "fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service * * *." See *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29.

The effect of the Transportation Act of 1940, 54 Stat. 899, was not to curtail existing powers of the Commission over water-rail transportation. It extended the jurisdiction of the Commission over all-water interstate servic and rearranged the provisions theretofore applicable to joint water-rail service and incorporated provisions of section 3 (e) of the Inland Waterways Corporation Act into the amended Interstate Commerce Act.

The present act in section 305 (e), which is the water-carrier counterpart of section 3 (1), prohibits undue or unreasonable preference or advantage and then provides:

> Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Again, in section 307 (d) of the present Act, the Commission is directed, in establishing through routes and joint rates:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Thus the Act itself contains provisions under which the Commission may prescribe specific proportionals applicable only to a particular water traffic to and from the port, or joint water-rail rates differentially under all-rail rates, and further, that carriers may have rates applicable to all-water traffic, which may be different from the rates applicable to rail-water or all-rail transportation through the same port.

If it be kept in mind that the difference between a combination of proportionals and a joint rate is one of method of rate making not one of substance, it becomes clear that there is no forbidden discrimination *per se* in failing to require the application beyond the port of the rail proportional on water-borne traffic or, conversely, of the water rate to the rail-borne traffic.

The declaration of a national transportation policy in the Transportation Act of 1940 does not constrict the specific provisions of the Act. It seems to have been the position of the plaintiff

in these suits as well as that of the court below that this policy was especially designed for the benefit of water-borne traffic and that its interests should predominate over all other interests. But the language of the declaration does not support such an interpretation. The Commission, in administering and enforcing the provisions, is enjoined to see to a "fair and impartial regulation of *all modes of transportation* * * * so administered as to recognize and preserve the inherent advantages of *each*, to promote safe, adequate, economical and efficient service in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discrimination, undue prejudices or advantages or unfair or destructive competitive practices * * *." [Italics supplied.] Plainly equal consideration is to be given each mode of transportation and the several kinds of carriers. The inherent advantage of each mode of transportation, whether rail, water, or motor carriage, is to be recognized and preserved. What these several inherent advantages are the Act does not say. Necessarily it is left to the Commission to ascertain and evaluate them. It may be assumed that one of the inherent advantages of water transportation is lowness of cost. *Cf. Inland Waterways Corp.* v. *Alabama, G. & S. R. Co.*, 151 I. C. C. 126, 144. But who is to measure that advantage in a given situation, and how far does

it extend and to what extent must it be preserved where it collides with an inherent advantage of another mode of transportation service? As this Court said in the prior decision in this case, 319 U. S. 671, 691:

> It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport.

That this is true is especially illustrated in the instant case. The advantage to shippers accessible to the inland waterways is the low cost of the transportation of grain to Chicago. That cost increases with the distance of the river origin from Chicago until it becomes more advantageous to ship by barge to southern markets (R. 21). Where grain is barged to Chicago does the inherent advantage of low cost transportation extend to ultimate destination which can be reached only by rail? Considering the through transportation to what extent must the lower cost of barge-rail transportation be given effect as against the advantage of all-rail transportation between the same points?

Again, the inherent advantage of low-cost barge transportation is moot unless it be translated in dollar and cents benefit to the shipper-farmer. We do not gainsay that a combination barge-rail rate lower than an all-rail rate may affect the price which the farmer receives for his grain. But it is only one of several factors which determines that price. Among those factors is the cost of

getting the grain to the river elevators. The farther the farmer is from the river the less the "inherent advantage" of barge transportation is to him. Thus as shown on Table IV of the Commission's report (R. 48) the volume of grain transported by barge to Chicago decreases as the trucking charges for delivery to the river port increase. So too the longer the river haul is with its consequent cost increase the less the volume of grain transported. Plainly the cost of trucking to the river and the cost of barge transportation play just as important parts from the standpoint of the farmer-shipper as the outbound rail costs. Yet the position of the appellees assumes that the last-named factor, despite the inability of the Commission to control the two other factors,[8] is the full measure of the inherent advantage to which the farmer-shipper is entitled.

In this aspect the situation of the barge lines is no better. The transportation policy requires the Commission to promote safe, adequate, economical, and efficient service in transportation and among the several carriers and to avoid un-

[8] The Commission found that port-to-port rates on bulk grain over the Mechling Barge Line were not subject to its jurisdiction. Sec. 303 (b) (R. 23).

As to the motor transportation involved in the movement from producer to consumer, section 203 (4) exempts from regulation motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural products, or motor vehicles used in carrying agricultural commodities if not used in carrying any other property or passengers for compensation.

just discrimination, undue prejudices or advantages, or unfair or destructive competitive practices. The barge lines complain that the rates approved by the Commission will result in diversion of traffic from them to the rail lines. That there may be some diversion of traffic is not denied. But their contention assumes that they are entitled under the law to all the traffic they are now carrying and any loss of that traffic as a result of the Commission's order automatically invalidates it. In other words they claim that the present territory from which they now draw traffic—up to 77 miles from the river elevators—is inflexibly tributary to their mode of transportation. But in the nature of things that cannot be so for an increase or decrease in their own barge rates or in the cost of trucking to the river necessarily diminishes or expands the territory. It must follow that a loss of traffic resulting from the Commission's order cannot *per se* condemn it. This situation further emphasizes that the problem before the Commission was one of administration, to determine what rates for the ex-barge traffic would be fair and equitable from the standpoint of the two types of carriers involved. Compare *Scandrett* v. *United States*, 32 F. Supp. 995, affirmed 312 U. S. 661.

In the light of the express provisions of the Act the emphasis upon the National Transportation Policy loses force. As has been shown, the

inherent advantages of both the rail and water transportation in this case which must be recognized and preserved are not susceptible of precise accounting. Here the Commission is called upon to exercise its expertise upon the record developed before it. It is not for the reviewing court to usurp this function.

From the practical standpoint the position of appellees and the lower court is untenable. It would mean that the lowest available rail proportional would have to be given the ex-barge traffic. But under the present rate structure to points in Central Territory there are three varying sets of proportional ex-rail rates applicable. Even the appellees ask only that the present Northwest proportional be applied which is not the lowest basis of rail proportionals in all cases. Again, many rail shipments move out of Chicago on the basis of a transit balance of a one-factor rate. Would ex-barge grain, as a matter of law, be entitled to move out by rail at the lowest possible transit balance? To carry out the logic of such reasoning would mean the total disruption of all-rail rates and incurable chaos.

B. In Determining the Proper Measure of Ex-Barge Proportionals the Commission did not Err in Discarding the Current Ex-Rail Proportionals as a Standard of Reasonableness

A great deal of confusion in this case has been engendered by the fact that the advent of barge transportation projected a new and unforeseen

factor in the over-all grain rate structure. By mere accident of tariff language proportional rail rates have been applied to this ex-barge traffic. These rates had developed over a period of years in relation to the movement of grain by rail and were part of a complicated grain rate structure, the components of which were interrelated so as to reflect average transportation conditions governing the entire movement of grain from the producing fields to points of ultimate consumption. Grain rates are constructed on a combination basis from western origins to Official Territory. The through charges are composed of rates from producing origins in the west to western market points plus intermarket rates between these markets and the gateway points and then the proportional rates from the gateways to destinations in Official Territory. The rates from the western points of origin to the gateways were prescribed by the Commission in *Grain and Grain Products,* 205 I. C. C. 301. In approving the construction of rate-break combinations the Commission had in mind the reasonableness of the through rates from producing origins to final destinations. It said (p. 328):

> The rate-break combinations on the Missouri River markets from Kansas, Nebraska, and other western States to Chicago and St. Louis were the result of first checking in reasonable through rates from

the origin key points to the final markets, over the direct routes through the Missouri River markets, and then breaking them back into inbound local rates to the latter markets and proportional rates beyond, on the basis of average relative mileages, resulting in proportional rates approximating the average transit balances that would have resulted if one-factor through rates with transit, in lieu of the rate-break combinations, had been prescribed. The rate-break combinations on Minneapolis from North Dakota and other northwestern States to Chicago, over direct routes through Minneapolis, also respond to this general test.

Again (p. 343):

* * * The question here is primarily the inherent reasonableness of the rates not only to the rate-break market, but also through those markets to the final markets or other destinations. The gateway relations are only incidental to the reasonableness of the total through charge. The rule for the exclusive application of the rate-break combinations is for the express purpose of according to the shipper a rate reasonable for the through service, over reasonably direct routes, and not only does not require, but does not permit, by the use of transit, of shipments at the same rate over other routes with different rate-break combinations.

In addition to the measure of the reasonableness of the through transportation charges from producer to consumer equitable provision had to be made for equalization of the through charges in order that the sum of the combinations would be the same through all the gateways, taking into consideration marketing conditions and the customs of the trade. It was also necessary that these through charges be equalized as between origin territories and destination areas where the service was substantially the same. *Southwestern Millers League* v. *A., T. & S. F. Ry. Co.*, 225 I. C. C. 195. And finally grain movements within Official Territory had to be related and reconciled to the scheme of interterritorial rates.

With this background we come to a consideration of the particular proportional rates that have been injected into this proceeding and upon which the appellees have relied as constituting the true measure of reasonableness and lawfulness for the ex-barge traffic out of Chicago.

From Chicago to points in Central Territory the applicable ex-rail proportional rates vary according to the origin of the grain. Grain from the Northwest takes a three-cent differential over grain from Trans-Mississippi territory. The purpose of the differential is to equalize Kansas City and the Twin Cities on shipments of grain through Chicago to Central Territory points and was prescribed by the Commission in *Southwestern*

Millers' League v. *A. T. & S. F. Ry Co.*, 225 I. C. C. 195; 227 I. C. C. 795. There, the Commission held that, average distances from Trans-Mississippi and Northwest territories requiring parity of treatment, a rate adjustment was not justified which would result in higher rates from one of the origin areas than from the other. Consequently the Commission prescribed varying proportionals east of the gateways which would work out an equalization.[9]

Another set of proportionals apply from Chicago to destinations in Central Territory on grain which originates in Illinois. These have been designated as Illinois proportional rates but under the wording of the tariffs do not apply from Chicago on ex-barge grain.

To destinations in Trunk Line and New England territories the proportionals are uniform regardless of origin. The evolution of this

[9] This rate relation was referred to by the Commission in its first report in this case, 246 I. C. C. 353, citing *Southwestern Millers' League* v. *A., T. & S. F. Ry. Co.*, 231 I. C. C. 130, where it was stated:

"Kansas City is what is known as trans-Mississippi River origin territory, and Minneapolis is in northwest territory. To most of the destination territory we required a parity of through rates from Minneapolis and Kansas City on traffic from beyond. This was accomplished by making the factors of the combination rates 3 cents higher, beyond Chicago and other related eastern gateways (no one factor rate being in effect), on traffic from beyond Minneapolis, than on traffic beyond Kansas City, because of in-bound rates to Chicago 3 cents less from Minneapolis than from Kansas City."

rate uniformity to Trunk Line and New England territories is set out in the Commission's report (R. 17). It grew out of a dissatisfaction resulting from the application of varying divisions or transit balances on shipments from Illinois origins as compared with the combination basis of through rates on shipments originating west of the Mississippi River.

Within Official Territory itself there is a full line of joint through one-factor rates from Illinois origins to eastern destinations, many of which apply through Chicago. The ex-Illinois proportional rates and these joint through rates combine to make the Official Territory grain-rate structure. The one-factor through rates apply through Chicago and also on east-west lines which bypass Chicago. The divisions accruing to the participating carriers are designated as inbound and outbound "specifics." Eastern Trunk Line Territory is reached from Illinois origins over east and west lines via direct routes, not passing through Chicago, and by north and south lines to Chicago in connection with rail lines east of Chicago. The demand has always been for the application of the through rates by way of Chicago even though the direct route would not pass through Chicago. *Western Grain Case*, 205 I. C. C. 301, 380, 215 I. C. C. 83, 103; *Grain Rates in C. F. A. Territory*, 28 I. C. C. 549. Consequently there is no distinction to be made in fact

between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate.

But the history of the joint through rates shows that the specific or proportional rate beyond Chicago is not a true measure in fixing the eastern factor of ex-barge traffic. Because of the comparatively short hauls from Illinois origins to Chicago arbitraries were allowed the western roads in order to secure for them compensatory revenue for the initiation, carriage and termination of the traffic at Chicago. As a consequence the eastern factor represented a lesser division of the through rates than would have resulted from a rate constructed on a mileage scale and, therefore, afforded no proper basis for comparison.

As was pointed out in *Grain Rates in C. F. A. Territory, supra,* the application of these through rates via Chicago is the result of competition between the north and south railroad lines and the direct east and west lines, so that the rate level beyond Chicago on grain from Illinois origins to eastern destinations is actually a transit balance arising out of competitive rates via circuitous routes.

A division of a joint rate is not a proper standard by which to test the lawfulness of separately

established rates. *Merchants Exchange* v. *Mo. P. R. Co.*, 248 I. C. C. 683, 688; *Ashland, C. & I. Co.* v. *A. C. L.*, 241 I. C. C. 120, 132; *Board of Trade* v. *A. C. R. R. Co.*, 20 I. C. C. 504, 508. In the case last cited the rail charge from Buffalo to Boston on ex-lake grain was 12.5 cents. At the same time the rail rate from Chicago to Boston, via Buffalo, was 18 cents out of which the carrier out of Buffalo received a division of 7.9 cents of the through rate. It was contended that the rail line from Buffalo to Chicago in handling its portion of the through-rail movement for 7.9 cents, while exacting a rate of 12.5 cents for the same movement on ex-lake grain, was unjustly discriminatory against lake grain and Chicago. The Commission stated (pp. 508, 509):

> This Commission has uniformly held that the division of a through rate was not a matter of concern to the public, and that while it might be looked to for certain purposes it should not ordinarily be made the standard of reasonableness or the measure of discrimination. The total rate is the thing of consequence, not the manner in which that charge may be shared among the different parties to it; and this could hardly be better illustrated than by the present instance. If lines west of Buffalo were to make the entire shrinkage, allowing to lines east of Buffalo divisions equivalent to the local from Buffalo, this ground of complaint would be removed, but the complain-

ant would be in no respect benefited. The true inquiry is whether, upon the whole, there has been an unjust discrimination, and we are hardly prepared to find that such a discrimination does of necessity arise out of the fact that these all-rail carriers insist upon meeting the lake-and-rail rate.

The Commission's report points out that these joint through rates apply whether the traffic moves in continuous through transportation or is stopped at the gateway or other intermediate point for marketing or processing (R. 18).

On grain arriving at Chicago by lake the ex-rail proportionals apply outbound, the Northwest proportionals to Central Territory destinations, and to Trunk Line and New England Territories the uniform proportionals or specifics.

The scale of local or flat rates out of Chicago are applicable to local grain, grain that arrives by truck at Chicago, grain moving into Chicago on the lake local (intrastate) rates, or grain that has forfeited its transit privilege thus taking on the character of local grain. These are the rates which the Commission used in determining the differentials which should be applied to the ex-barge grain moving out of Chicago.

In undertaking the task of prescribing a scale of out-bound proportional rates, the Commission could not close its eyes to a rate structure developed over a period of many years under its own

guidance. And this was especially required because of the contention that the ex-barge traffic was entitled to proportional rates no higher than the ex-rail and ex-lake traffic bear. Since this contention was based upon the assertion that there is no material difference in the circumstances and conditions affecting the outbound and through rates on the barge-rail, lake-rail and all-rail traffic, it became necessary to examine these proffered standards of reasonableness and lawfulness. This the Commission did by reviewing the history, purpose and scheme of the particular rail proportionals and their relation to the grain rate structure as a whole. The report considers in some detail the rail rate adjustment. It points out the basis upon which the present rail proportionals were established. It shows that these proportionals evolved out of a mutual desire to eliminate varying transit balances were simply representative of divisions of through rates via Chicago brought about by competition between short route and circuitous route carriers, and that such proportionals or specifics did not, *per se*, establish a reasonable standard for rating the eastbound ex-barge rail service. Insofar as the varying rail proportionals to Central Territory were concerned they too furnished no proper measure for determining ex-barge proportionals to the same destinations since they were designed in reference to a single segment of a through rail

transportation service and to provide an equalization in the over-all charges as between the gateways.

It is submitted that the theory upon which these rail proportionals were designed and established itself justified the Commission in discarding them as appropriate standards for the ex-barge traffic.

But the impropriety for the use of the existing rail proportionals was demonstrated in another respect by the Commission. In connection with the ex-rail proportionals the fourth-section rule applies as follows (R. 18):

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[10] Section 4 (1):

"It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, * * *."

(Here follows provision for relief from the operation of the above in special cases.)

The Transportation Act of 1940 amended section 4 (1) of the Interstate Commerce Act to read as above quoted. Paragraph (b) of section 6, while not in terms an amendment of section 4 (1) of the Interstate Commerce Act, provided:

"(b) In case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Com-

> In no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rate from the reshipping point to be added to the reshipping rate therefrom.

The result of this rule is to limit the application of the out-bound proportional rate to traffic on which a minimum inbound rail rate of 8.5 cents was paid. The Commission shows that the all-rail structure reflects a consistent grading of the rates from east to west in strict conformity with

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merce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period until the Commission has acted upon such application." (54 Stat. 904, 49 U. S. C. 49, sec. 4, note.)

As to these provisions the Commission in its report stated (R. —):

"Under section 6 (b) of the Transportation Act, 1940, respondents [rail carriers] are not required to increase their present ex-barge proportionals to bring the barge-rail combinations in harmony with fourth-section principles."

section 4, with the exception of some departures caused by the differing levels of the proportional rates to Central Territory (R. 18).

Barge proportionals equivalent to the rail proportionals would lack the purpose and consistency underlying the latter. The factors which entered into the establishing of the through all-rail combinations do not find their counterpart in fixing ex-barge proportionals. Of special importance is the fourth-section rule mentioned above. Under the existing combinations of the inbound barge charge plus the rail proportionals to Central Territory numerous and extreme fourth-section departures exist. The Commission in its prior report in this case described them as follows (246 I. C. C. 353, 374):

> For example, such combinations [barge-rail proportionals] result in lower through charges to the Atlantic seaboard than the local rates to the same destinations from intermediate origin points on: (1) domestic grain from all points in Central Territory (Chicago and east) west of a line drawn from Bay City, Mich., through Jackson and Sturgis, Mich., and Kendallville, Fort Wayne, Marion, Westville, Indianapolis, Greenburg, Ind., to Aurora, Ind.; (2) export grain from all points in Central Territory (Chicago and east) west of a line drawn from Atkins, Mich., through Oxford, Ann Arbor, Hanover, and Pittsford Junction, Mich., and thence along the Ohio-

Indiana State line to the Ohio River; and (3) export traffic of barley, corn, oats, rye, and wheat from all points in Central Territory (Chicago and east) west of a line drawn from Painesville through Lordstown to East Liverpool, Ohio.

To perpetuate this situation would be to legalize for the ex-barge traffic what this Court termed "the fortuitous and in many respects unlawful benefits of the existing rate structure" (319 U. S. 671, 691).

C. In Finding That the Differentiating Characteristics as Between the Barge-Rail Transportation Service and the All-Rail Transportation Service Justified a Different Rate Treatment, the Commission Did Not Transcend Its Statutory Authority or Act Arbitrarily

The ultimate position of the appellee barge lines and of the court below is that a denial of the ex-rail proportionals to this barge traffic works a violation of section 3 (4) as a forbidden discrimination against connecting carriers.[11] The discrimination thus forbidden partakes of the same quality as discrimination and undue prejudice against

[11] This provision operates only in favor of connecting carriers subject to part I or part III. It was earnestly contended by the western rail carriers before the Interstate Commerce Commission that the barge-transportation in question was intrastate commerce and therefore beyond the Commission's jurisdiction under section 303 (j), and further, as to Mechling Barge Line, their transportation fell within the exception of section 303 (b) so as to take it beyond the Commission's jurisdiction. As to the latter the Commission held that it was without jurisdiction (R. 23).

persons and localities. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361. Equality of treatment under this section must be determined by similarity of circumstances and conditions. *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I. C. C. 289, 301; *Atlantic Coast Line R. Co.* v. *Cape Fears Rys., Inc.*, 218 I. C. C. 152, 157; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20; cf. *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 F. 567, appeal dismissed, 149 U. S. 777.

Under the issues presented to it in this case the Commission was called upon to perform the purely administrative function of determining independently whether the barge-rail service and the all-rail service presented such differentiating characteristics as to justify different rate treatment. *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 322; *United States* v. *Trucking Co.*, 310 U. S. 344, 352, 353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346. Comparing these two services, the Commission concluded that such differences did exist.

But even so it is difficult to find a discrimination against the barge-rail service as a whole. The ex-barge proportionals approved by the Commission result in barge-rail combinations averaging about 5 cents less than the corresponding all-rail rates to trunk-line and New England terri-

tories and to central territory barge-rail combinations averaging 6.5 cents less than the all-rail combinations (R. 35). Table V of the appendix to the Commission's report (R. 46) shows the average barge-rail combinations approved compared with the present and proposed combinations. Translating this result in terms of a specific movement: the barge-rail combination from Morris, Ill., to New York is 31 cents, made up of the 2-cent barge rate and the ex-barge proportional rate of 29 cents, whereas the all-rail combination between the same points is 35.5 cents made up of an inbound rail rate of 9.5 cents and the outbound proportional of 26 cents. There is thus a 4.5-cent differential in favor of the barge-rail movement. Even though we add to the barge-rail combination the trimming charge of 0.7 cent the rate advantage still lies with the barge-rail shipper. Under this view the lower court's finding that ex-barge and ex-rail grain coming from an identical origin west of Chicago will always take a different reshipping rate from Chicago (R. 185) is devoid of significance, and illustrates the fundamental error of the court in viewing the outbound movement as a single, independent, and unrelated shipment.

Throughout its report the Commission was careful to stress the fact that it was treating of a through barge-rail transportation service and that its one concern was to establish a reasonable and

non-discriminatory charge for that service. Its task was the same as if it had been called upon to prescribe joint barge-rail rates under the provisions of section 307 (d). In fact, its order reopening the proceeding contemplated that alternative (R. 56). That it did not do so was due to the desire of all the parties that the method of arriving at the lawful charges for the through transportation service should conform to the same scheme of rate-making that governed the rail movement of grain (R. 14). No attack had been made on the inbound barge rates and in the face of a showing that the existing barge rates were compensatory, the Commission properly accepted such rates as established components of the through transportation charges to be determined (R. 23).

Again pointing out what this Court in its prior decision had confirmed, namely, that the disparate circumstances and conditions surrounding the all-rail and lake-rail transportation as contrasted with barge-rail transportation would under proper circumstances justify differences in rates, the Commission categorically summarized what those differentiating circumstances and conditions were, thus (R. 31):

> Where, as here, ex-rail and ex-lake proportionals or specifics reflect average circumstances and conditions surrounding the all-rail and lake-rail transportation which

differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.

The principal differences as shown by this record and described above may be summarized as follows:

1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory.

2. The inbound rail hauls of all traffic which engages the ex-rail proportionals are substantially longer, on the average, than the inbound barge hauls.

3. The rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic here considered, include:

(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of the gateways an average outbound factor which is a component part of many through rates of different amounts which vary with the length of the inbound hauls and the western factors applicable thereto.

(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the inbound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways.

(c) The ex-rail proportionals or specifics, combined with the inbound interestate rates or specifics, result in through all-rail rates to official territory which harmonize with each other and with the local rates in that territory.

4. Lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul inbound and is usually preceded by an inbound rail haul. The rail-lake-rail combinations, in general, conform to the principles which underlie section 4. In these respects lake grain is like barge grain from Kansas City but unlike barge grain from Illinois. To trunk-line and New England territories, the lake-rail grain differs from all of the barge-rail grain moving through Chicago in that the lake-rail grain can and generally does by-pass that gateway entirely.

The court below, echoing the arguments of appellees, enters into an elaborate discussion dressed in the form of findings to show that the differing circumstances and conditions do not justify the

rate treatment which the Commission accorded this barge traffic. Its conclusion is generalized in Finding No. 37 (R. 204), to the effect that the Commission considered matters that have "no rational relation to the conclusion that such ex-barge reshipping rates could lawfully be those, higher than such ex-rail and ex-lake reshipping rates, prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940.

A reading of the argument (Findings 27 to 36, incl., R. 195) demonstrates its fatuity. The principal infirmity lies in its assumption that the issue involved the determination of the lawful rates for the unrelated movement of the ex-barge traffic from Chicago to the eastern destinations and that a scale of rates based on average conditions must necessarily fall if it be shown that minor inconsistencies may develop when the approved rates are applied to some specific movements. Failure to attain universal equitableness and harmony within a comprehensive grain rate structure is insufficient to condemn it, even assuming the accuracy of the lower court's counter-findings and its competency to make them. As this Court said in *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546–548:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that

must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581–582.

The wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process is strikingly vindicated by this history of this controversy. * * * There was no ready answer either in law reports or in economic experience. Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body. In this perspective, the Commission had several choices before it—but all inevitably rested upon trial and error. * * * Of only one thing could the Commission be completely certain: no action could be taken without "adversely affecting certain of the conflicting interests." 164 I. C. C. 619, 698. * * * That the Commission itself was of a divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have

> neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain-rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants.

Here the court below endeavors to show that the Commission's subordinate findings of differentiating circumstances and conditions do not rationally sustain the ultimate finding that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics. It makes a series of so-called findings which purport to show the irrationality of the Commission's conclusion. In so doing it adopts some of the Commission's findings and ignores others. Thus it makes a finding that the same transportation differences exist between ex-barge and ex-lake grain on the one hand and ex-rail grain on the other based upon the Commission's statement that ex-lake grain never moves in continuous through transportation (R. 197). But this ignores the Commission's finding that lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul inbound

and is usually preceded by an inbound rail-haul and that the rail-lake combinations, in general, conform to the principles which underlie section 4; that lake-grain to trunk line and New England territories can and generally does by-pass the gateway (R. 32).

Again the lower court's finding that the present ex-rail rates are not contingent upon the amount of terminal or transit service such ex-rail grain receives (R. 197), gives no effect to the Commission's full discussion of the history and development of those rates and their inappropriateness in measuring the level of rates to be accorded the ex-barge traffic.

The lower court assumes facts not appearing in the record as a basis for a finding of the Commission's inconsistency in its application of rate-making principles to arrive at the approved ex-barge proportionals (R. 194). Whether or not mere inconsistency is sufficient to condemn the order—Cf. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663—the conclusion the lower court reaches ignores the evolution of the Official Territory grain rate structure and the factors which entered into the present level of rates for movements therein (*supra*, p. 40).

Categorically to reply to all the detailed findings, criticisms, and argument employed by the court below to sustain its judgment would unduly prolong this brief. We submit that a careful

study of the Commission's report demonstrates their fallacy.

II. The Report of the Commission Rationally Supports the Approved Scale of Ex-Barge Proportional Rates

In reaching its conclusions the Commission's report first considers in detail the rate history and the several current rate adjustments which apply on all-rail traffic, lake-rail traffic and barge-rail traffic.

As to the all-rail adjustment the report finds (R. 21):

> The all-rail adjustment by providing proportionals or outbound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assists them in maintaining a common price, thus facilitating hedging and other market operations. The all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and circuitous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points. It moves in box-cars with an average loading of about 50 tons on grain and a somewhat lighter loading on grain products. The present proportionals can be and are maintained in connection with the all-rail traffic and at the same time farmers and all others con-

cerned accorded local and through rates for rail transportation aligned with each other.

As to the lake-rail adjustment the report finds (R. 22):

> Unlike the all-rail traffic, the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading, and requires a full origin terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation. The inland lake movement consists chiefly of wheat moving for relatively long distances. The rail-lake-rail combinations are in substantial conformity with fourth-section principles.

As to the barge-rail adjustment the report finds:

> * * * The Federal Barge Line serving Kansas City and the Mechling Barge Line serving the Illinois origins are common carriers and their port-to-port rates are on file with us. Such rates are subject to our jurisdiction except those of Mechling in instances where not more than three kinds of grain are transported in a given tow. * * *[12] (R. 23).
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> * * * The barge-rail combinations are not made subject to the above-quoted

[12] Section 303 (b) of the Interstate Commerce Act provides: "Nothing in this part [Part III] shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities."

fourth-section rule and from Illinois are generally far below the local rates from Chicago and also lower than the local rates from numerous intermediate origins in central territory, constituting numerous and extreme departures from the long-and-short-haul provisions of section 4 of the Interstate Commerce Act. * * * This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins and it is difficult to see, with such extreme disparities, how such requests could properly be denied. * * * (R. 24.)

The barge movement from Illinois origins consists chiefly of corn moving for relatively short distances. The barge movement from Kansas City consists chiefly of wheat moving for relatively long distances, but very little has moved to Chicago during recent years on account of scarcity of barges and channel difficulties.

* * * It is true that from origins in northwestern Illinois (north and west of the Chicago-Peoria-Fort Madison, Iowa, line), the all-rail grain moves to northern central and trunk-line and New England territories principally via Chicago or Chicago junctions, which may be said to be reasonably direct hauls. But from the many Illinois origins south and east of that line, the direct routes are not via Chicago. In this connection, it should be noted that, on grain from these and central-territory

origins over their direct single-line routes, respondents [rail carriers] obtain the entire amount of the through rates or of local rates which harmonize therewith. Whether the direct route be single or joint, the line-haul service which they perform beyond the Chicago junctions on traffic to the southern portion of central territory is substantially less than the service they perform out of Chicago (R. 24–25).

* * * Barge grain is marketed but not processed at Chicago. It follows that respondents [rail carriers] are called upon to perform more transit, on the average, on the ex-barge than on the ex-rail traffic (R. 26).

The report condemns the proposed tariffs which would have subjected the ex-barge grain traffic to the local rates to eastern destinations. It finds:

* * * To trunk line and New England territories, the ex-lake rates from Buffalo, averaging 17.7 cents or 16.5 percent of first class, apply not only on lake traffic from the Northwest but also on barge-lake traffic moving via Chicago. The proposed schedules would make no change in the rates from Buffalo but would increase the ex-barge rates from Chicago to an average of 32.5 cents or 21.4 percent of first class. This would create an unjustified disparity which will be avoided by the proportionals herein prescribed on the ex-barge traffic

from Chicago averaging 27 cents or about 17 percent of first class (R. 22).

Under the proposed schedules, the barge-rail combination on grain from Kansas City to the East, processed into flour at Cleveland, would average 42.5 cents, composed of the 9.5-cent barge rate to Chicago, plus the average local rate beyond of 33 cents on grain products, while the barge-rail combination on flour milled at Kansas City would continue at an average of 35.5 cents, composed of the 11-cent barge rate on grain products to Chicago, plus the 24.5-cent rate on the products beyond. This creates an unjustified disparity which will likewise be avoided by the proportional rates prescribed herein resulting in barge-rail combinations on this Cleveland and Kansas City traffic averaging 37 and 38.5 cents, respectively (R. 28).

* * * In any event, under the proposed schedules, the barge-rail traffic via Chicago would not have a fair opportunity to move in competition with the all-rail and lake-rail traffic (R. 29).

In that portion of the report which carries the heading "General Discussion and Conclusions" (R. 28) the Commission meets the various contentions made by the parties to the proceeding, and in particular the contention, which is the substantial basis of this court action, namely, that the ex-barge traffic is entitled to proportionals no higher than the ex-rail and ex-lake proportionals

or specifics. It concludes that the transportation differences as between the all-rail and barge-rail transportation justifies a different rate treatment of the latter (R. 31).

In determining a proper level of proportional rates the Commission set out the guiding principle which should govern its ultimate determination. This was fundamentally the effect on the movement of the traffic not only from the standpoint of the barge lines should the present ex-barge proportionals be increased, but on the rail lines should the existing ex-barge proportionals be perpetuated, all in the light of the national transportation policy as affecting the various competing relationships (R. 33). It found that the present barge-rail combinations being so much lower than the all-rail combinations from the same and other origins have diverted and will continue to divert a substantial portion of the traffic to the barge-rail routes via Chicago from the all-rail routes, including those through Indianapolis and other markets (R. 33). On the other hand the Commission finds that if the rates on ex-barge traffic are adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto",[19] the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traf-

[19] 319 U. S. 671, 691.

fic (R. 33) [11] since the combination barge-rail rates under the approved scale are in all instances less than the combination all-rail rates.

In determining what should be the proper level of the ex-barge proportional rates the Commission first considered the formulae theretofore applied by it in prescribing joint barge rail rates (R. 34). It demonstrates in the present instance that the methods used in determining joint barge-rail rates would not meet the situation and finally concludes that the ex-barge traffic should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practical the commercial needs thereof, just as the ex-rail traffic, for similar reasons, has been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation. The Commission then reverts to the prescribed western trunk line scale as a yardstick for averaging the balances to trunk line and New England territories and then grading back the proportionals so arrived at through central territory (R. 35). The appropriate formula for arriving at the rates approved is set out as follows (R. 35):

> The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded

[11] Only 25 percent of ex-barge corn received at Chicago during the period June 1, 1937, to December 31, 1941, moved outbound by rail (R. Exhibit 189, p. 33).

the same out-bound proportionals if, as the Act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower in-bound cost but, in addition, would extend to the barge-rail transportation most of the advantages of all-rail transportation. However, all of the ex-barge traffic can and should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practicable the commercial needs thereof, just as the ex-rail traffic, for similar reasons, has been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation. Protestant-petitioners ask that on the ex-barge traffic to trunk-line and New England territories we prescribe uniform proportionals regardless of origin. Under all the circumstances, such uniform ex-barge proportionals may be arrived at by averaging balances to those territories under the w. t. l. scale[15] from the respective barge origins, namely, 28.5 cents ex-Illinois, 26 cents ex-Kansas City considered alone, and 25 cents ex-Kansas City considering the prior rail hauls. We thus arrive at proportionals averaging 27 cents, and made uniformly 5.5 cents under the local rates and 3 cents higher than the ex-rail and ex-

[15] *Grain and Grain Products*, 164 I. C. C. 619, 822.

lake proportionals or specifics. To trunk-line and New England territories the resulting barge-rail combinations will average about 5 cents less than the corresponding all-rail rates. Grading such proportionals back through central territory so as to fit the barge-rail traffic via Chicago and at the same time avoid any new fourth-section departures, we arrive at ex-barge proportionals to that territory averaging about 17 cents and ranging about from 1 to 5 cents, and averaging 2.4 cents, under the local rates. To that territory the resulting barge-rail combinations will average about 6.5 cents less than the all-rail combinations.

The results thus achieved are shown in Tables IV and V of the Commission's report (R. 45, 46).

Finally the report shows that the ratio and the spread or differential, barge-rail under all-rail, resulting from the basis prescribed, are considerably greater than those resulting from the joint barge-rail rates prescribed in other cases, and fully reflect the contribution of this barge grain to the transportation economy as shown by the present record (R. 36).

We submit there is nothing in this administrative treatment that oversteps the limits of the Commission's statutory authority or convicts it of arbitrariness.

III. The Findings of Fact and Conclusions of Law of the Court Below Disclose a Plain Usurpation of the Exclusive Administrative Function of the Interstate Commerce Commission

In adopting the findings of fact and conclusions of law submitted by the appellees in this case the court below has given legal sanction to judicial review of administrative action which militates against well-established principles and, if permitted to stand, may serve only to confuse the fundamental issues in future cases involving the validity of the Commission's orders.[16]

This Court in its decisions running over many years has crystallized the law relating to judicial review. The pertinent inquiries open to a reviewing court may be summarized for present purposes thus: (1) Was the order within the Commission's statutory authority; (2) Was the order supported by adequate findings; (3) Were such findings supported by substantial evidence; (4) Were there any prejudicial procedural defects in the proceeding?

In *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663, this Court said:

> To consider the weight of the evidence before the Commission, the soundness of

[16] The findings of fact and conclusions of law adopted by the court below are at variance with its orally announced judgment at the hearing on the merits. See R. pp. 168 to 174, incl.

> the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the findings of the Commission, supported by substantial evidence, is conclusive, unless there is some irregularity in the proceeding or some error in the application of rules of law.

Mr. Justice Frankfurter, speaking for the Court, in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139–140, 145–146, distinguished between the "primary jurisdiction doctrine," requiring resort to the Commission in the first instance on matters within the peculiar competence of that body, and the doctrine of "administrative finality," said of the latter:

> Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.* 222 U. S. 541. * * *
>
> So long as there is a warrant in the record for the judgment of the expert body it must stand. * * * Having found that

the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287.

Where a rate problem is involved the doctrine of administrative finality is especially appropriate since the technical complexities of such cases precludes judicial inquiry on the merits. *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 512, 513. In the last cited case this Court said:

> * * * "the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries a heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602. The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. "With that sort of

> evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive." *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 550.

The instant case involves the determination by the Commission of the proper and lawful rates for the barge-rail transportation of grain. This determination has been committed to the Commission and must be kept free from judicial intrusion, as was clearly indicated in *United States* v. *Trucking Co.*, 310 U. S. 344, 352, 353:

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." And where a court substituted "its judgment as to the existence of preference for that of the Com-

> mission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute." So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made unlawful discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination.

With these well-established principles in mind let us examine the findings of the court below upon which it predicated its adjudication of the invalidity of the Commission's order.

The lower court's approach to its decision is based upon its findings of underlying facts couched in its own language, although partially

supported by footnotes referring to the Commission's findings of similar facts. These findings (Nos. 4 to 14, incl., R. 178–182) purport to recite circumstances surrounding the physical movement of grain to and through Chicago, the volume of such movement, the hauling and storing and marketing of such grain. While it may not be that this factual recital is not supported by the record, it is equally clear that the court is picking; choosing, eliminating, weighing, and evaluating the facts for the purpose of testing the validity of the order.

Findings Nos. 15 and 16 (R. 182–185) recite the procedural history of the proceeding. In so doing the lower court refers merely to the prior decision of this Court in the case as "sustaining the Commission's order," without reference to the legal precepts enunciated which guided the Commission in its further action in the case. In these findings as well as in subsequent ones the court below characterizes the rate differentials approved by the Commission as penalty rates which characterization is unwarranted in view of the widely disparate circumstances and conditions surrounding the barge-rail, as contrasted with the all-rail, transportation, carefully and fully pointed out and discussed in the Commission's report.

Findings Nos. 17, 18, and 19 (R. 185–189), assume to predict the consequences of the Commission-approved rates. The court concludes that

the new ex-barge proportionals would "substantially decrease the volume of grain moving by barge to Chicago." In support of this factual conclusion the lower court makes detailed independent subordinate factual findings and independent deductions and prognostications based thereon as supporting argument for its ultimate conclusion.

Without further consideration *seriatim* of the lower court's findings it may be pointed out that they in effect constitute simply an effort to substitute, for the administrative findings of the Commission, independent court-made findings of the evidentiary facts and court judgment applied thereto, as for example where it attempts to refute the Commission's differentiation between barge-rail and all-rail service (see p. 52, *supra*).

Finally the lower court's practically complete usurpation of the Commission's function is confirmed by the fact that it ignored, discarded as of no weight, or weighed the probative value of many of the findings of the Commission's report. Thus it gave no effect to the Commission's finding that the ex-rail proportionals from Chicago are subject to the fourth-section rule (R. 18). It failed to give effect to the finding that under the all-rail adjustment the through rates and eastern factors thereof on grain from barge origins are substantially lower than they would be under an adjustment from all-rail origins west of Chicago

of the same average level but made on a distance scale where the outbound balances or proportionals would vary inversely with the length of the inbound and through hauls (R. 19). It gave no effect to the finding that the Illinois intrastate rates, made to meet truck and water competition, do not engage the ex-rail proportionals from Chicago (R. 20). It gave no effect to the finding that the all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and continuous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points (R. 21). It held irrelevant the Commission's findings that the rail-lake-rail combinations are in harmony with fourth-section principles, that Chicago is primarily an outbound lake port on grain (R. 32). It treated as immaterial the finding that the ex-barge proportionals are not subject to the fourth-section rule so that the barge-rail combinations from Illinois are in most instances far below the all-rail rates from Illinois origins and also far below the all-rail rates from intermediate origins in Indiana, Ohio, and western Pennsylvania, constituting numerous and extreme fourth-section departures (R. 24). It gave no weight to the Commission's findings that service under the ex-rail proportionals in connection with direct all-rail routes is less than the service under the

ex-barge proportionals from Chicago and that there is more transit service under ex-barge proportionals than under the ex-rail (R. 26). It gave no effect to the Commission's findings that in barge transportation two intermediaries are required between the farmer and the dealer at the primary market and that barge grain cannot be transported from or to rail facilities away from the river at Kansas City and Chicago without transfer of lading and extra switching (R. 27). It gave no effect to the finding that the fourth-section rule and relative service limitation, usually imposed in barge-rail cases, would in this case result in considerably higher ex-barge proportionals than those approved (R. 34).

We submit that the lower court in this case has in real effect brushed aside the Commission's report and itself assumed the right to review independently the record upon which the Commission acted and to substitute its judgment for that of the Commission.

IV. The Court Below Exceeded Its Authority in Requiring the Commission by Its Injunction Pendente Lite To Suspend the Filed Rates

Upon a showing of irreparable injury which would beset the plaintiffs should the approved rates become effective the court below enjoined the Commission from "permitting to become effective any tariffs or tariff supplements that have or may be published in conformity with said

order of the Commission * * *," and requiring it "forthwith to take all steps needful faithfully to observe the said restraints hereby imposed pending the hearing and determination of this cause, including the suspension of said tariff publications" (R. 154). In so doing the court below exceeded its authority.

The jurisdiction of the District Court is "to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission," either on final hearing or on application for temporary stay. Urgent Deficiencies Act, 38 Stat. 219, 220. While it is recognized that the court upon a proper showing should issue such order as will protect the rights of the complaining parties, it cannot cure a fatal defect to the relief sought by requiring the Commission to exercise a statutory power arbitrarily and contrary to its mandate. Nor would such an injunction have been necessary had the plaintiffs joined as defendants the railroads which had published the offending tariffs. Obviously it was these rail carriers against whom the injunctive process should have issued. The court below, however, closed its eyes to this situation and compelled the Commission to use its suspension power in a manner not authorized by the statute.

Under the long-established scheme of railroad regulation, carriers have been given the right to inaugurate their own rates and to change them

from time to time subject only to the formalities of printing, publishing, filing, and keeping them open to public inspection. Rates so promulgated cannot ordinarily be stricken down except after hearing and appropriate findings by the Commission. The one obstacle to a railroad filing and making effective any rate it pleases is section 15 (7) which authorizes the Commission, either upon complaint or upon its own initiative, to enter upon a hearing concerning the lawfulness of a proposed rate and, as an incident of such hearing, to suspend the operation of such rate for a period not to exceed seven months. That the power so conferred is a limited one is emphasized by the provision that it shall expire after a given period and the rate proposed shall go into effect regardless of whether or not the proceeding has been concluded.

By its interlocutory injunction the lower court in this case required the Commission to suspend the proposed rate as an independent exercise of statutory power minus the predicate which the statute demanded. That this situation was brought about by plaintiffs' failure to make these rail carriers defendants, is made clearer by the fact that the rates in question could lawfully have been made effective by them had the Commission made no finding at all with respect thereto.

V. The Court Below Acted in Excess of Its Authority in Requiring That the United States Be Made a Party Appellee

As has been heretofore stated, the defendant United States, in its answers filed to the complaints, confessed error and joined in the prayers for relief; and, based upon such answers, it has asserted a right to be treated as an appellee and formally to be served as such with all papers required by the Rules of Court for the perfecting of an appeal. Notwithstanding the Department of Justice was fully apprised of the appeal and copies of the appeal papers given it, it obtained a rule to show cause in the court below and an order thereon compelling the Commission formally to serve the appeal papers upon it and amending the order allowing the appeal and the citation to show the United States as a party appellee (R. 221).

The statutory warrant for the prosecution of suits to set aside orders of the Interstate Commerce Commission is the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. 41 et seq. Such suits must be brought against the United States, but the Interstate Commerce Commission and any party in interest may intervene as of right; and "the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute,

defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General" (Section 45a); and, in instances of decrees of the district courts setting aside Commission orders where the Attorney General fails or refuses to appeal therefrom, the Commission or any other party, intervening as of right, may appeal independently. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14.

While, in suits to set aside Commission orders, the United States has not only at times taken a neutral position but at others has similarly, as here, filed answers confessing error and asking that the orders complained of be set aside, it has not heretofore asserted that such answers so changed its status as statutory defendant as either to entitle it to be treated as a necessary appellee in instances of decrees setting aside such orders (cf. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503)[17] or to entitle it to itself appeal in instances of decrees sustaining the Commission's orders as valid. *McLean Trucking Co.*

[17] In this case, the United States, in filing answer, did not confess error, but announced that it was taking a neutral position. However, on the appeal by the Commission to this Court, the United States filed a memorandum urging affirmance of the district court's decree. Its right to do this is not questioned, but it is clear that such right is essentially different from the right asserted here to be treated as a necessary appellee.

et al v. *United States et al.*, 48 F. Supp. 933, 936, affirmed 321 U. S. 67; *American Trucking Assn. et al.* v. *United States et al.*, 56 F. Supp. 394, 400, reversed 326 U. S. 77. In both these latter cases, the United States filed answers confessing error. Also, in both cases counsel for the United States submitted argument in the district courts, both orally and in briefs, urging invalidity of the Commission's orders and, in the *McLean case*, the Secretary of Agriculture, an intervening plaintiff, joined in the appeal. But in neither case did the United States, the statutory defendant, attempt to join in the appeal to this Court from the district court decree sustaining the validity of the Commission order involved.

The Commission does not question the right of the Attorney General to express his views with respect to an order of the Commission the validity of which has been put in issue in a suit under the Urgent Deficiencies Act, either in the district court or in this Court. However, for the United States to assert, in such case as here, the right to be treated as an appellee, we submit, not only creates an additional burden upon parties seeking appellate review but stultifies the statute. The implications arising from a confirmance of this right clearly show that such position is untenable.

Under the Urgent Deficiences Act the United States is the only necessary party defendant. If no other parties in interest intervene in defense

of the Commission's order a confession of error on the part of the United States would provide ground for setting aside the order. On the other hand should the Commission or other parties intervene in defense of the order their right to be heard is uncontestable. But the mere fact that there are intervening defendants in such cases does not convert the United States from its statutory role as defendant into a plaintiff with the right to appeal from an adverse judgment. If such right exists it must be based upon statutory authority of the United States to institute a suit in its sovereign capacity to set aside a Commission order in the first instance. But no such right exists by statute which would result in the anomaly of a proceeding entitled United States v. United States.

It would also follow, should the position of the court below be sustained, that the United States might alone appeal a decree setting aside an order of the Commission. Suppose in the instant case the court below had sustained the order in question and the plaintiffs in the suit were unwilling to prosecute an appeal, would the United States alone have the right to appeal to this Court? We think not, yet the logical application of the ruling of the court below would seem to sustain such right.

Because of the probable future complications that may arise on appeals to this Court and to

stabilize the procedure the order of the lower court compelling the United States to be made a party appellee should be held in error.

CONCLUSION

The complexities which have been introduced into this case have been occasioned by the successful efforts on the part of appellees to obtain a new hearing before the lower court upon the administrative merits involved in determining the proper and lawful level of rates for the ex-barge grain traffic. Testing the validity of the Commission action by conventional standards of judicial review a great deal of confusion and misdirection is avoided.

The Commission was called upon to fix rates for this ex-barge traffic. This Court had already decided that the Interstate Commerce Act did not preclude the fixing of such rates at a different level from those applicable to the ex-rail traffic, providing the circumstances and conditions surrounding the latter justified different treatment. The Commission found such differences existed. It, thereupon, proceeded to determine what level of rates for the ex-barge traffic would be fair and equitable to all concerned, having in mind the conflicting interests of the competing carriers, the interests of producers having access to the water routes and those not having such access, the relationship of the rates to the whole

transportation economy which represented the broad public interest involved. It performed this task in the maner it deemed best upon the record before it. It issued its report containing its basic findings and conclusions setting out the rationale of its action. The record supports its findings. We respectfully submit, therefore, that the judgment of the court below be reversed and the several complaints dismissed.

DANIEL W. KNOWLTON,
Chief Counsel.

DANIEL H. KUNKEL,
Attorney.

APPENDIX

INTERSTATE COMMERCE ACT, 49 U. S. C.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue prefcrences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1 (4). It shall be the duty of every common carrier subject to this part to provide and

furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this part,

than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 3 (4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates,

fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 6 (11) (a). To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this part.

(b) To establish proportional rates, or maximum, or minimum or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is

taken by the water carriers and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, clasification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or

practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interstate carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

PART III, SEC. 303 (b). Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space

of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

PART III, SEC. 305 (c). It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rate, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation

from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

(d) All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I.

SEC. 307 (d). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where

one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

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In the Supreme Court of the United States

OCTOBER TERM 1945.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

A. L. MECHLING, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, APPELLEES.

MOTION OF INTERSTATE COMMERCE COMMISSION FOR ORDER IN DIMINUTION OF PRINTED RECORD

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 1010

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

A. L. MECHLING, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, APPELLEES.

MOTION OF INTERSTATE COMMERCE COMMISSION FOR ORDER IN DIMINUTION OF PRINTED RECORD

Now comes the Interstate Commerce Commission, appellant, by its counsel, and moves the Court for an order in diminution of the record to be printed in this appeal, and as reasons therefor assigns the following:

This cause is a direct appeal from the judgment and decree of a specially constituted three-judge district court for the Northern District of Illinois, Eastern Division, annuling and setting aside, in part, an order of the Interstate Commerce Commission which approved as lawful a specified schedule of proportional rates for the transportation by railroad from Chicago, Ill., to certain eastern destinations, of grain receiving a prior move-

ment into Chicago over the inland waterways system.

The record upon which the Commission acted was introduced in evidence by plaintiffs in the court below and has been transmitted to this Court as part of the record in this appeal. This record consists of the transcript of testimony taken at hearings held at various times over a period of more than six years, aggregating several thousand typewritten pages together with several hundred exhibits many of which are themselves voluminous. A substantial part of this record was printed in connection with the appeal in No. 175, October Term 1942, *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, wherein a prior order of the Commission in the same proceeding was sustained by this Court.

In conformity with Rule 13, par. 8, of the Revised Rules of this Court, the Interstate Commerce Commission filed with the Clerk a designation of the parts of the record which it thought necessary for this Court's consideration of the points to be relied upon excepting, however, that portion of the record before the Commission which had previously been printed in connection with the appeal in No. 175, October Term, 1942, for the reason that such portion of said record was already accessible to this Court in printed form and to reprint it would occasion substantial expense on the part of the government. Such designation was

duly served upon counsel for appellees including the Attorney General of the United States. Whereupon the latter designated the entire record before the Commission as necessary to be printed and filed such designation with the Clerk.

Thereafter, in order to avoid the heavy expense to the Government involved in printing the entire record upon which the Commission acted, counsel for the Commission, by letter, proposed that all counsel in the case endeavor to agree upon and stipulate what particular portions of the Commission's record should be printed with the understanding that those portions of said record which would not be printed might be referred to in brief and argument. To this suggestion counsel representing Inland Waterways Corporation, the Secretary of Agriculture and the United States, stated their several acquiescence but counsel for appellee A. L. Mechling, although being fully apprised of the proposal, has failed to indicate a willingness to try to agree upon such stipulation.

Aside from certain jurisdictional objections, the main and substantial issue in this appeal is whether the Commission exceeded its statutory authority in approving proportional rail rates from Chicago to eastern destinations which are differentially higher on ex-barge grain than on ex-rail grain. In holding that the Commission exceeded its authority in this respect the court below specifically challenged the decision of this

Court in *Interstate Commerce Commission v. Inland Waterways Corporation, supra.*[1]

The court below, however, in adopting the findings of fact and conclusions of law prepared and submitted by plaintiffs, entered into a lengthy and detailed discussion of the evidence before the Commission and made its own independent findings of evidentiary facts, which supplement and enlarge and in some instances contradict the Commission's findings of evidentiary facts as disclosed by its report. This action of the court below gives rise to a further issue of gravest importance, namely, in judicial review of administrative determinations may the court examine the record before the administrative body, arrive at its own independent findings of fact and upon such findings appraise the validity of the administrative action.

There is also the conventional test to be applied in this case, whether the Commission's findings are

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[1] "Judge Evans: We come to the very interesting situation here, that apparently this Court [the Supreme Court] as it now stands, three members of the Court, not counting Judge Jackson as a majority, there are four members who were opposed to you there. Maybe your opponents are asking them for a new deal, just on the chance that they may draw an ace the next time. But we want the Commission to so treat the water competition in a manner that tends to give it full advantage of its inherent quality and superiority. And we still feel that way.

"I think there is only one way to do it, and in view of the reasonableness of your presentation, the only thing is to take it up again and thresh it out once more. * * *". (Transcript of Proceeding, October 16, 1945, p. 38.)

adequate to support its order and afford a rational basis therefor.

The only issue in this appeal which might require the printing of the record before the Commission arises out of the fourth conclusion of law filed by the court below and assigned as error, namely "Findings made by the Commission in support thereof [the order in issue] are not supported by the record in respects stated in the foregoing findings of fact." But, in the opinion of appellant, this conclusion is too general, vague and indefinite to raise a justiciable issue.

To print the record as presently designated by appellant and appellees would involve expenditure by the government of many thousands of dollars, which is not essential to a determination of the substantial issues involved in this appeal. That such a determination can be had, without prejudice to the rights of any of the parties, by elimination from the record to be printed the testimony and exhibits in the proceeding before the Commission, reserving to the several parties the right, however, to refer in brief and argument, should they deem it necessary, to the printed record in No. 175, October Term, 1942, or to the typewritten transcript as filed in this Court as to those matters of record before the Commission which are not included in said printed record.

For the reasons stated, the Interstate Commerce Commission, appellant, respectfully moves your Honorable Court for the entry of an order in

diminution of the record to be printed in this appeal by eliminating therefrom the transcript of testimony and exhibits in the proceeding before the Commission, subject to the reservation above indicated.

JUNE , 1946.

DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney, for the Interstate Commerce Commission, Appellant.

CERTIFICATE OF EVIDENCE

I hereby certify that I served the foregoing motion upon counsel for appellees by mailing copies thereof addressed as follows:

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JUNE 3, 1946.

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U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1946.

Interstate Commerce Commission, Appellant, v. A. L. Mechling, Inland Waterways Corporation, the Secretary of Agriculture, and the United States of America.	Appeal from the District Court of the United States for the Northern District of Illinois.

[March 31, 1947.]

Mr. Justice Black delivered the opinion of the Court.

A District Court of three judges enjoined in part an order of the Interstate Commerce Commission, and the case is here on appeal under 28 U. S. C. §§ 47, 47a, and 345. The Commission order specifically relates to the railroad rate for grain transported from Chicago, Illinois, to New York and other eastern points,[1] after that grain has been transported to Chicago from the west by connecting rail or water carriers on through bills of lading. In such through shipments the through rate is a combination of distinctly separate rates charged respectively for shipments from the west to Chicago and from Chicago to the east. The charge fixed for the last leg of the shipment is called, in railroad parlance, a "reshipping" or "proportional" rate. It is lower from Chicago to the east than a "local" rate charged for a shipment from Chicago to the east which originates in Chicago. See *Atchison, T. & S. F. R. Co.* v. *United States*, 279 U. S. 768, 771.

[1] The eastern points are in New York and adjacent states and in New England. It is around shipments from Chicago to this territory that this rate controversy chiefly revolves. The proposed new rate increases also related to grain shipments from Chicago to the so-called central territory. The reasons supporting the conclusion we reach apply equally to the central territory increases, and consequently we need not treat them separately.

For many years eastern railroads have carried grain east from Chicago at reshipping rates 8½ cents per hundred pounds lower than local rates. Up to 1939 this Chicago-to-the-east reshipping rate had been identical for grain, whether brought to Chicago by a connecting railroad, connecting lake steamer, or connecting barge. Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads. The result was that the barge-rail rate from a point in the west to eastern destinations was considerably cheaper than the all-rail rate from that point—the difference being measured by the relative cheapness of shipping over the barge leg of the through route. Because of the cheaper barge rates, much of the railroads' grain freight business from localities which could be served by either barge or rail shifted to the barges [2] after 1933 when barge service from western grain localities to Chicago was resumed.[3] This was the barge versus rail competitive situation which existed when in 1939 the eastern railroads filed schedules with the Commission which imposed on ex-barge grain the local rate from Chicago east, but allowed ex-rail and ex-lake grain the benefit of the 8½ cent lower "reshipping" rates on the eastern haul. The result of this rate schedule would have been that, although barge lines could still have carried grain from the west to Chicago much more cheaply than the railroads could, by the time the grain had been reshipped to New York or other eastern points, the barge-rail carriage would have been more expensive to the shipper than all-rail carriage. This would have put the barge lines at a competitive disadvantage with railroads in barge-served localities. At the Com-

[2] See 246 I. C. C. 353, 361, 364, 383; 262 I. C. C. 7, 41.

[3] There was barge service from the grain section west of Chicago to that city from 1886 to 1907 when it was discontinued. Such barge service was resumed in 1933. See 262 I. C. C. 7, 20.

mission hearing to test the validity of the higher ex-barge grain rates, a railroad representative candidly stated that the purpose of the proposal was to "drive this business off the water and back onto the rails where it belongs." 248 I. C. C. 307, 321. This purpose would most probably have been accomplished had the high ex-barge reshipping rates gone into effect.

The Commission, after a hearing, made an order which left the railroad-proposed higher rates in effect, but stated that "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." 248 I. C. C. 307, 311. A District Court set aside the Commission's order on the ground that fixing higher rates for ex-barge grain than for ex-rail and ex-lake grain rates "discriminates against water competition by the users of barges." 44 F. Supp. 368, 375. On appeal this Court reversed, saying that its decision carried "no implication of approval of any rates here involved." *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 691. It reserved for future consideration in a proceeding before the Commission the amount, if any, which the eastern railroads could increase "reshipping" rates for ex-barge over those for ex-lake and ex-rail grain. *Id.* at 687–688, 691.

The Commission has now considered and decided that question in a proper proceeding. 262 I. C. C. 7. It found the originally proposed 8½ cent higher rates for ex-barge grain to be unlawful and required the eastern roads to cancel the schedules fixing those increased reshipping rates. This part of the Commission's order has not been challenged. But it also concluded that ex-barge grain rates east from Chicago would be reasonable and lawful even though they were 3 cents per hundred pounds higher than rates for ex-rail and ex-lake grain. Consequently, the Commission provided that its order cancelling the sched-

uled reshipping rate increase was "without prejudice to the filing of new schedules in conformity with the findings herein." Thus, the effect of the whole order was to permit, if not require, the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain. Under these rates, barge-rail grain shipments would be a trifle less expensive than all rail transportation between the same points.[4] But the through barge-rail transportation would cost more than it would have if the through rates had accurately reflected the cheaper in-bound barge rates. The Commission considered these higher rates for ex-barge grain, which resulted in higher through rates, justified so long as there remained to ex-barge grain "a fair opportunity to move in competition with lake-rail and all-rail traffic."

Appellees[5] then filed this action in the District Court against the Commission and the United States to cancel, annul, and enjoin enforcement of the order, insofar as it permitted the railroads to put these new higher ex-barge grain rates into effect. The complaints charged that the order was in violation of the Interstate Commerce Act as amended by the Transportation Act of 1940, 54 Stat. 898. It was contended that the order was void because it approved railroad rates which penalized ex-barge grain to the extent of 3 cents per hundred pounds, solely because the grain had been transported to Chicago in barges, and without evidence or adequate findings that it cost the railroads 3 cents more to transport ex-barge than it cost to

[4] The ex-barge proportionals fixed by the Commission were uniformly 5.5 cents lower than local rates from Chicago to the east and 3 cents higher than ex-barge and ex-lake proportionals.

[5] Appellees are (1) A. L. Mechling, a barge water carrier between Chicago and points in Illinois, Missouri, and Iowa; (2) Inland Waterways Corporation which transports grain by barges between, among other points, Kansas City and Chicago; (3) the Secretary of Agriculture, who is authorized by statute to make complaints to the Interstate Commerce Commission, and to seek judicial relief with respect to rates and charges for the transportation of farm products.

transport ex-rail or ex-lake grain. The United States, represented by the Department of Justice, appearing as a defendant, admitted these allegations. The Interstate Commerce Commission intervened and defended the order. After a hearing, the District Court found that the allegations were sustained. Accordingly, it set aside and enjoined enforcement of the order to the extent that it permitted the 3 cent extra charge.[6] The result of the District Court's judgment was to leave in effect the long-existing eastern railroad rates which provide the same rates for carrying ex-barge, ex-lake, and ex-rail grain east from Chicago.

Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited. And, § 307 (d) of the 1940 Act[7] authorizes the Commission "in the case of a through route" to "prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in

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[6] Two procedural points are raised by the Commission which need not be discussed at length. The first is that the District Court's preliminary injunction was too broad because it enjoined the Commission from permitting the controversial rates to become effective. This question is now moot, but see *Inland Steel Co.* v. *United States*, 306 U. S. 153, 159–160. The second procedural point urged relates to the District Court's order requiring the Commission to serve notice of appeal on the United States. We see no error in this, and even if there were, it could not be prejudicial in connection with the Commission's rights on this appeal. Since the United States was necessarily a party in the District Court, 28 U. S. C. 46, *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, 382, we think the District Court cannot be held in error for requiring service of the notice of the Commission's appeal.

[7] 54 Stat. 899, 937; 49 U. S. C. § 907d. In the original proceedings before the Commission, the last evidence was heard and the record was closed before the 1940 Transportation Act became a law. *Interstate Commerce Commission* v. *Inland Waterway Corp.*, 319 U. S. 671, 678. The present proceedings are fully governed by the 1940 Act.

connection with such common carrier by water." *Cf. United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including "differentials" between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service.[8] As Senator Wheeler, spokes-

[8] Illustrative of the attitude of Congress is this exchange between Senator Lucas and Senator Wheeler, Chairman of the Interstate Commerce Committee:

"MR. LUCAS. . . . The town in which I live is a focal point for the transportation of wheat and corn down the Illinois. The price of wheat and corn at the elevator there is always 2 or 3 cents higher than it is at elevators some 25 or 30 miles farther inland because of the difference between the rates by rail and those by water.

"Under the bill, as I understand it, the Interstate Commerce Commission would have the power, and it would be its duty, to fix rates on the Illinois River with respect to the transportation of that wheat and corn. Would it be possible for the Interstate Commerce Commission to fix the rate the same as the railroad rate from that point to St. Louis?

"MR. WHEELER. Not if the Commission does its duty, because the bill specifically provides that it must take into consideration the inherent advantages of the water carrier. Everyone agrees that

man of the Interstate Commerce Committee of which he was chairman, pointed out on the floor of the Senate, the 1940 Act contains at least three separate provisions, a prime purpose of which is to protect the water carrier's natural advantages.[9] The Act's declaration of policy emphasizes that the Act must be "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation subject to this Act." 54 Stat. 898, 899, 49 U. S. C. notes preceding §§ 1, 301, 901. In order that the inherent advantages might be preserved § 305 (c), 54 Stat. 898, 935, 49 U. S. C. § 905 (c), provided that "Differences in . . . rates . . . and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination . . . or an unfair or destructive competitive practice . . ." And § 307 (f), 54 Stat. 898, 938, 49 U. S. § 907 (f), requiring the Commission, in fixing rates, to consider "the effect of rates upon the movement of traffic by the . . . carriers for which the rates are prescribed" emphasized that the Commission must consider in fixing rates ". . . the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with furnishing of such service." In addition § 3 (4) of the pre-existing Act which forbade carriers "to discriminate in their rates, fares, and charges between

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goods can be shipped more cheaply by water than by rail." 84 Cong. Rec. 5879 (1940).

Chairman Lea of the House Committee on Interstate Commerce stated in debate that:

"The bill very plainly, about as plainly as language can be written, provides for the protection of the inherent advantages of water transportation as contrasted with other means of transportation. In fixing rates the water carrier is assured the advantages of the cheaper rate at which he can transport property." 84 Cong. Rec. 9862 (1940).

See also 84 Cong. Rec. 5883, 6126–6128, 6131, 6149 (1940), and Conference Report, 86 Cong. Rec. 10172 (1940).

[9] 84 Cong. Rec. 5873–5876, 5883, 6131 (1940).

connecting lines," 41 Stat. 479, was amended by the 1940 Act specifically to include water carriers, such as these barge lines, within the definition of connecting carriers. 54 Stat. 898, 903–904, 49 U. S. C. § 3 (4). Finally § 2 of the pre-existing Act has long forbidden the Commission to authorize railroads to charge one person more than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." 24 Stat. 379, 380; 49 U. S. C. § 2.

The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. And § 307 (d) authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of the other provisions which were strengthened in 1940 expressly to prevent a discrimination against water carriers.

The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. For while Chicago

is a great grain center, it cannot consume all barge-transported grain. That grain, like other grain coming to Chicago for marketing or processing, is reshipped to distant destinations. To penalize its transportation in barges by charging discriminatory rates from Chicago to its final destination has precisely the same consequence as would follow from raising barge rates inbound to Chicago. Recognizing that it could not require these barge carriers to raise these inbound rates which it accepted as reasonable,[10] the Commission has here approved an order which would bring about the same prohibited result by raising the railroad rates charged by eastern roads for ex-barge grain shipments east from Chicago. Congress has forbidden this.

The Commission did not approve increases in these reshipping rates on the ground that the eastern roads were not receiving a fair return for carrying ex-barge grain. And the grounds on which the Commission rested its order do not support the rates approved. Most of the argument of the Commission in support of its conclusions and order treated matters which had no relation to what the reshipping rates from Chicago should be. The length of the total barge-rail haul emphasized by the Commission, however significant it might be under other circumstances, has no relevance here. For the lower rates allowed ex-rail and ex-lake grains include carriage for distances identical with the ex-barge hauls. Nor is the Commission's order supported by its conclusion that it is "inequitable" for the barges to charge a much lower rate for the inbound grain haul than the competitive western railroads can afford to charge for the same haul, resulting in barge-rail rates lower than all-rail rates from

[10] The Commission stated that "The barge rates yield fair returns to the barge carriers, and for the purpose of this proceeding, may be accepted as reasonable." 262 I. C. C. 7, 19.

the same localities.[11] For this is no reason for authorizing a higher rate to eastern railroads which do not compete with the barges at all. If the western railroads need relief from the competition of barges, that is a question wholly unrelated to the rates of eastern roads. Furthermore, Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads

[11] The Commission expressed concern that "the barge-rail rates are far below the all-rail rates from the same and other Illinois origins. This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins and it is difficult to see, with such extreme disparities, how such requests could properly be denied. . . . (T)here is a substantial production of corn in the central territory. While the farmers therein did not appear at the hearing to show that they were hurt by this situation, such evidence was adduced by others in the same relative position. . . . This is what is meant by the statement . . . that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure." In *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 499, 509, this Court said of an earlier Commission rate decision made on the basis of preserving the over-all rate structure from disruption: "We are warned . . . that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana . . . in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. . . . The point of the decision is not that the present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds."

from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. *Cf. Mitchell* v. *United States*, 313 U. S. 80, 97.

Related to the question just discussed, is the Commission's contention here that permitting reshipping rates for ex-barge grain to remain equal to the rates for ex-rail and ex-lake grain will cause "incurable chaos" in and disrupt the national rail rate structure which reflects many interrelated conditions governing the transportation of grain from west of Chicago to eastern markets. The Commission does not show how any possible disruption of railroad rate structure arises from giving shippers the full inherent advantage of cheaper barge rates, other than that competing railroads have lost traffic to the barge lines. As we have pointed out, Congress knew that barge line rates were cheaper than rail rates, wanted the shippers to get full benefit of them, and left the Commission no power to take that benefit away from shippers by adjusting rail-barge traffic competition or rates. But we note incidentally that these rates had been equal prior to 1939 without any apparent disruption of the total structure. The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. See *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 499, 506–510. Nor is the fact that barge-rail rates from certain places in the west through Chicago to the east, are less than local rail rates from Chicago east, an adequate reason for increasing the east-of-Chicago part of the through barge-rail rate. The initiation of new rates with such a disparity in through rail rates as compared with local rail rates would, of

course, be forbidden by § 4 of the Act as amended in the absence of Commission approval.[12] But, insofar as the inherent cheapness of the barge leg of the through route produces a disparity between barge-rail rates and local rail rates, Congress has said that the Act must be so administered as to preserve, not eliminate or reduce the disparity.

Carriage of ex-barge grain by eastern roads may conceivably entail more service and therefore greater costs than are involved in carrying ex-rail or ex-lake grain. If so, the eastern roads may, in certain circumstances, be justified in receiving an extra charge for that extra service wherever it is rendered. But the extra service must fit the extra charge and cannot justify lump sum rate increases which cut into the inherent advantages of cheaper barge transportation which Congress intended to guarantee to shippers. Here the Commission found in broad general terms, without limitation to the localities where barge and rail compete, that "on the average" ex-rail grain from all the west requires less terminal and transit service east of Chicago than does grain moving by barge from the relatively few barge terminals.[13] As to terminal service, it noted that some rail grain traffic going through Chicago without stopping receives no terminal service at all, whereas all barge grain shipments must be unloaded in Chicago and reloaded on freight cars. But all ex-lake grain reshipped from Chicago and an unspecified amount of ex-rail grain stopped in Chicago for processing requires

[12] See § 6, Transportation Act of 1940, 54 Stat. 898, 904, 49 U. S. C. § 4.

[13] The Commission stated that "on the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals . . . . requires less terminal service at the gateway . . . less transit service at intermediate points in official territory, and less line haul service to the southern points."

exactly the same terminal service as is rendered there for ex-barge grain.[14] Yet there is no greater rate charged for ex-barge and ex-rail grain which receives this same terminal service. The formula used here which lumps all through rail grain rates, irrespective of the services rendered, to give rail-carried grain a preferred rate over barge-carried grain, is indistinguishable in cause and consequence from an order which directly raises barge rates to relieve the railroads from barge competition. In any event, there has been no showing by the Commission as to how much, if any, of the 3 cent reshipping rate increase is attributable to the fact that ex-barge grain requires more terminal service on the average than does ex-rail grain.

The Commission also pointed out in its decision that rail rates from the west to Chicago (which we must assume on this record are fair and reasonable for the services performed) permit three transit stops west of Chicago without extra charge. Thus some ex-rail grain, unlike ex-barge and ex-lake grain, has already been processed en route to or in Chicago before it ever reaches the eastern lines, reducing the likelihood that it will require further transit service on the route from Chicago to the east.[15]

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[14] The Commission's statement was that "Like the lake-rail traffic, the barge-rail traffic requires transfer of lading and a full origin terminal service at the interchange port . . . (I)t never moves in continuous through transportation." 262 I. C. C. 7, 21.

A similar precise statement does not appear in the Commission's decision with reference to terminal services rendered ex-rail grain. It assumed throughout its discussion, however, as shown by its reliance on averages, that a large but unspecified amount of all-rail grain shipments receive the same terminal services as does ex-barge grain.

[15] There is apparently no processing of barge carried grain in Chicago. The railroads there charge 3.25–4.5 cents per hundred lbs. to switch barge grain at Chicago from riverside elevators to processing plants. 262 I. C. C. 7, 24.

But ex-lake grain which enjoys the proportional rates with the approval of the Commission apparently is not processed before arriving at Chicago, or before reshipment on the eastern lines, and consequently requires the same transit service on the eastern haul as is required by ex-barge grain. Similar transit service is required for the unspecified amounts of ex-rail grain not processed east of Chicago. But the Commission made no finding that the eastern reshipping rates permit transit service east of Chicago without extra charge. Probably the reason that it did not make such a finding is that carriers usually make a specific extra charge for transit service. See *Central R. Co. of N. J.* v. *United States*, 257 U. S. 247; *Atchison T. & S. F. R. Co.* v. *United States*, *supra*, 777, 780. And the record here shows that eastern railroads make extra charges for transit service rendered ex-barge grain east of Chicago. The Commission makes no showing why, if the existing railroad charges for each individual transit operation is insufficient to cover that operation's costs, those charges cannot be adjusted alike for the ex-rail, ex-lake, and ex-barge shipments which require this service. In any event, partial compensation of eastern roads for additional transit costs cannot be made in a manner which singles out ex-barge grain for discriminatory treatment in violation of the Interstate Commerce Act.[16]

To justify increasing the reshipping rates of ex-barge grain the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-barge grain than of ex-lake or ex-rail grain moving from the same locali-

[16] It is noteworthy that in its previous consideration of these same ex-barge grain reshipment rates, the Commission was satisfied that "the physical carriage beyond the reshipping point is substantially the same" in ex-rail, ex-lake, and ex-barge shipments. 248 I. C. C. 307, 311.

ties and requiring the same service as does the exbarge gram. *Cf. Florida* v. *United States*, 282 U. S. 194, 212; *North Carolina* v. *United States*, 325 U. S. 507, 520. The unsifted averages put forward by the Commission do not measure the allegedly greater costs nor indeed show that they exist.

Affirmed.

MR. JUSTICE FRANKFURTER would sustain the order of the Interstate Commerce Commission, because he deems it amply supported by adequate findings of the Commission differentiating the average circumstances and conditions surrounding all-rail and lake-rail transportation from those affecting barge-rail transportation, 262 I. C. C. 27–28, and these findings are not without support in evidence.

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1946.

Interstate Commerce Commission, Appellant, v. A. L. Mechling, Inland Waterways Corporation, the Secretary of Agriculture, and the United States of America.	Appeal from the District Court of the United States for the Northern District of Illinois.

[March 31, 1947.]

Mr. Justice Jackson, dissenting.

It appears to me that the Court in this case not only ignores findings of fact by the Interstate Commerce Commission contrary to our own oft-repeated pronouncements about the finality of administrative findings, but it also legislates out of the Transportation Act of 1940 at least two specific provisions which Congress put in and departs from the policy laid down in § 1 of the Act. Whether the Congressional law or the Court's amendments are the better for the country is a complicated problem of policy which, in my conception of our judicial function, I am not privileged to decide.

In the Transportation Act of 1940, 54 Stat. 937, *et seq.*, Congress authorized the Commission to establish through rates by water and rail carriers. It also said, "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." § 307 (d). The Court reads this discretionary power out of the statute and holds that the Commission may not establish any differential other than that created by the carriers themselves; that is to

say, the only permissible differential is the difference between barge rates and rail rates for the water leg of the through journey.

The statute also says that in the exercise of its rate making power "the Commission shall give due consideration, among other factors, to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed." § 307 (f). The Commission has done so and finds that a greater differential than that prescribed would create unjust advantages and diversions of traffic. But the Court ignores the effect of what it orders on existing rate structures and on grain producing regions and shippers other than barge users. It simply writes in "shall not consider" where Congress said "shall consider."

Because this decision seems to me to deprive the Commission of these discretionary powers to adjust through rates to general shipping conditions and rate structures, I dissent.

MR. JUSTICE FRANKFURTER joins in this opinion.